

37921

REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

September 6, 1916 to January 22, 1917.

37921

H. A. LIBBY

REPORTER

VOLUME 35

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FOR THE STATE OF NORTH DAKOTA.

**OFFICERS OF THE COURT DURING THE PERIOD OF
THESE REPORTS.**

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HON. A. M. CHRISTIANSON, Judge.

HON. LUTHER E. BIRDZELL, Judge.

HON. RICHARD H. GRACE, Judge.

HON. JAMES E. ROBINSON, Judge.

H. A. LIBBY, Reporter.

J. H. NEWTON, Clerk.

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District No. Three,
HON. A. T. COLE.¹

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HON. J. A. COFFEY.

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District No. Nine,
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Elected at the 1916 general election to succeed:

¹ Hon. Charles A. Pollock.

▼

CONSTITUTION OF NORTH DAKOTA.

SEC. 101. Where a judgment or decree is reversed or confirmed by the Supreme Court, every point fairly arising upon the record of the case shall be considered and decided, and the reason therefor shall be concisely stated in writing, signed by the judges concurring, filed in the office of the Clerk of the Supreme Court, and preserved with a record of the case. Any judge dissenting therefrom may give the reasons for his dissent in writing over his signature.

SEC. 102. It shall be the duty of the court to prepare a syllabus of the points adjudicated in each case, which shall be concurred in by a majority of the judges thereof, and it shall be prefixed to the published reports of the case.

COUNTY COURTS.

In general, the county courts (so designated by the Constitution) are the same as the probate courts of other states.

CONSTITUTIONAL PROVISIONS.

SEC. 110. There shall be established in each county a county court, which shall be a court of record open at all times and holden by one judge, elected by the electors of the county, and whose term of office shall be two years.

SEC. 111. The county court shall have exclusive original jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators and guardians, the sale of lands by executors, administrators, and guardians, and such other probate jurisdiction as may be conferred by law; provided, that whenever the voters of any county having a population of two thousand or over shall decide by a majority vote that they desire the jurisdiction of said court increased above that limited by this Constitution, then said county court shall have concurrent jurisdiction with the district courts in all civil actions where the amount in controversy does not exceed one thousand dollars, and in all criminal actions below the grade of felony, and in case it is decided by the voters of any county to so increase the jurisdiction of said county court, the jurisdiction in cases of misdemeanors arising under state laws which may have been conferred upon police magistrates shall cease. The qualifications of the judge of the county court in counties where the jurisdiction of said court shall have been increased shall be the same as those of the district judge, except that he shall be a resident of the county at the time of his election, and said county judge shall receive such salary for his services as may be provided by law. In case the voters of any county decide to increase the

jurisdiction of said county courts, then such jurisdiction as thus increased shall remain until otherwise provided by law.

STATUTORY PROVISIONS.

Increased Jurisdiction: Procedure. The rules of practice obtaining in county courts having increased jurisdiction are substantially the same as in the district courts of the state.

Appeals. Appeals from the decisions and judgments of such county courts may be taken direct to the supreme court.

The following named counties now have increased jurisdiction: Benson; Bowman; Cass; Dickey; La Moure; Ransom; Renville; Stutsman; Ward; Wells.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
NORTH DAKOTA

RE WILLIAM MALONEY.

(153 N. W. 385.)

Disbarment proceedings — hearing on — civil action against attorney — dismissal of — has no bearing on.

1. Dismissal of a civil action against attorney for moneys unlawfully detained by him has no bearing upon disbarment proceeding.

Client's interest — abandonment of by attorney — retention of fees paid — for services — not rendered — duties of attorney — wilful violation of — disbarment.

2. Abandonment of client's interest and retention of the fees paid for services, which are not rendered, constitute a wilful violation of the duties of an attorney and counselor sufficient to warrant disbarment.

Opinion filed June 7, 1915. Rehearing denied July 1, 1915.

Note.—That an attorney who, upon demand, retains money collected for his client, or fraudulently appropriates money which has come into his hands in a professional way, is not of such honesty and good character as to make him worthy of the confidence of the public and his clients, is the almost universal rule, as honesty, probity, and good moral character are necessary qualifications for the practice of his profession. For cases supporting this proposition, and for a further discussion of the matter, see note in 19 L.R.A.(N.S.) 414, on disbarment or suspension of attorney for withholding client's money.

For a discussion of the grounds of disbarment of attorneys and counselors at law, see notes in 95 Am. Dec. 335, and 45 Am. St. Rep. 71, page 78 of which takes up the question of the misappropriation of moneys.

35 N. D.—1.

Disbarment proceedings against William Maloney.

Original action in this Court.

R. A. Nestos, John A. Layne, of the committee on grievances of the State Bar Association for the prosecution.

W. G. Owens, for William Maloney.

LEIGHTON, Special Judge. This is an action commenced against William Maloney, a member of the bar of this state, under §§ 808 et seq. of the Compiled Laws of 1913, providing for the filing of charges in this court against any member of the bar in this state, and the prosecution of said charges by a committee of the said bar association. The original accusation charging two particular offenses was filed, and afterwards an additional charge was also filed. The original charge was served upon William Maloney, as well as the subsequent charge containing the additional accusation.

The first accusation in substance charges that William Maloney was practising law in Williston during the years 1911 and 1912, and that one O. P. Bakken was engaged in the general mercantile business in Tioga, North Dakota; that about February, 1912, Bakken employed Albert J. Stafne and William Maloney, who were then practising law in Williston as a copartnership to commence certain proceedings in his behalf, which are more fully discussed in the opinion, and that the defendants were paid the sum of \$700 in merchandise for said services, and that, after said services were paid for, the said copartnership, consisting of Stafne & Maloney, or either of them, thereafter performed no services, and failed on demand to return any part of the consideration, and appropriated the same to their own use.

The second accusation was concerning an action by Effie Wegley, who employed William Maloney to represent her in a certain action in Williams county, in which it was charged in substance that defendant Maloney represented to his client that he could make settlement of said action, and for that purpose obtained the sum of \$50, which he appropriated to his own use, and failed thereafter to return the same.

The third accusation was in regard to a certain transaction before the land department, whereby it was charged he defrauded one Laura Hosmer out of the sum of \$600. To all these different accusations William Maloney filed his answer, alleging a general denial of all the charges.

For the purpose of taking testimony, Honorable Frank E. Fisk, judge of the Eleventh district, was appointed by this court as a commissioner, and testimony was taken and submitted to this court without findings or conclusions. The matter comes up at this time upon the pleadings and the evidence taken before the commissioner, and without oral argument.

It is very evident from the testimony that Stafne & Maloney were employed by Bakken for the express purpose of instituting bankruptcy proceedings in the first instance, and either at that time or shortly afterwards to commence an action against one Sordahl, to set aside a certain deed, or to commence a personal action for damages against said Sordahl. It is not material in this controversy which of the latter actions they were to commence. It is equally clear that Stafne & Maloney also received goods from the Bakken store of the value of \$202. This was within a very few days after they were first employed. It is also clearly shown that immediately after these goods were taken, or about the same time, Stafne & Maloney took a \$500 chattel mortgage against the entire stock of merchandise belonging to Bakken. This merchandise was of the value of at least \$1,000. It is true that Bakken turned over the stock of merchandise and fixtures to Stafne & Maloney shortly after this mortgage was given, but it is equally clear that the same was done with the bankruptcy proceedings in Bakken's mind at that time. However, that is not very material whether it was for that purpose or not; it does not change in any manner the conclusion reached. The entire stock of goods was sold by Stafne & Maloney under the \$500 chattel mortgage, and the entire proceeds inured to their benefit. Different times thereafter Bakken saw and also wrote Stafne & Maloney regarding the action to be taken relative to the original employment. Nothing was ever done. No proceedings in bankruptcy were taken, and no action against Sordahl was commenced. From the time the goods were sold under the mortgage, there seemed to be no desire for action of any kind by Stafne & Maloney. There seems to have been various excuses offered, promises of future action, and an apparent effort made to drag the matter along and tire out Bakken, in which Stafne & Maloney were entirely successful. At no time, however, did Stafne & Maloney or either of them ever return any of the consideration or offer so to do.

It is claimed by Maloney that the stock taken was of little value, but

a part of the goods were afterwards sold for \$475, and also other goods turned over to creditors of Bakken in Williston. Stafne & Maloney did not care to have the transaction viewed too closely, and it is easy to understand why local people should be appeased if possible. Certain matters stand out clear and apparent. First, an employment and payment, and failure to perform only a very slight service for that payment.

It is impossible to draw any conclusion from the testimony, except that the money collected was without consideration, fraudulent, and with a corrupt design to deprive Bakken thereof without anything in return.

Maloney also contends that because a certain action commenced by Bakken against Stafne & Maloney to recover the amount paid by Bakken was dismissed by the plaintiff after the testimony in this action was taken should act as a bar to this action. It is unnecessary to discuss such a claim,—it is much like the explanations he has made in his testimony, and not worthy of consideration. The court is not bound by any such action, and is not governed by any action third parties see fit to take, for too many things enter into the dismissal of actions for us to give this contention any consideration.

There is an attempt on the part of Maloney to shift the blame upon Stafne. There is no question but Maloney and Stafne were in partnership during all the time the transaction took place; that Maloney shared in the proceeds of all the goods from Bakken's store, that he was present during a part of the transaction, and there has been no offer on his part to return any of the consideration. No other conclusion can be drawn but that he acquiesced in the transaction, and until the hearing of this action there is nothing to indicate but that he was satisfied. It is also evident that he knew at all times the nature of the transaction; and, such being the case, he cannot now complain.

The entire proceeds of the stock of goods came into the hands of Maloney & Stafne by reason of their employment as attorneys by Bakken. While they may have been acting in good faith at the time of the employment, they failed to take any action, and abandoned their client's interests. In equity and good conscience they should have returned the consideration, but there never was an offer made so to do. Certainly their retention of money after all efforts had been closed to render any services would constitute a wilful violation of the duties of an

attorney under our statute. It is impossible to draw any distinction between this state of facts and one in which attorney fraudulently appropriates to his own use money which comes into his hands in a professional way, and such cases have almost universally been held to constitute sufficient cause for disbarment.

As a result of the views expressed upon the first accusation it is unnecessary to present any findings upon the remaining ones. Sufficient to say the conduct as shown by the evidence fails to receive our approval. See also *Re Maloney*, 21 N. D. 157, 129 N. W. 74, for former proceedings.

An order of disbarment will be entered against William Maloney.

Goss and CHRISTIANSON, JJ., not participating. Hon. K. E. LEIGHTON, Judge Eighth Judicial District, sitting by request.

STATE OF NORTH DAKOTA EX REL. C. ERTELT, Joseph Kunze, John Gruman, Louise Gruman, Joseph Gruman, Charles Gruman, Mary G. Kunze, and Martha G. Daniels v. FRED DANIELS, Richard Adcock, and Christ Myrhow.

(159 N. W. 17.)

Action for the benefit of ticket holders to collect sureties upon a warehouseman's statutory bond for a default in redemption of grain tickets; *Held*:

Warehouseman's bond — sureties — action — for default in redemption of grain tickets — complaint — demurrer.

1. That the complaint states a cause of action, and the demurrer thereto was properly overruled.

Warehouseman — stored grain — may sell — demand for same — like grain substituted — conversion — basis of action for — ticket holder.

2. While, under § 3113, Comp. Laws 1913, the warehouseman may sell stored grain and upon a demand for the delivery of grain stored substitute like grain therefor, yet the ticket holder need not make a demand in the alternative for the same grain or that of an equal grade as a basis for conversion, where the ticket holder has demanded the return of his grain or payment of its value.

Demand — for grain or its value — warehouseman — burden — redelivery.

3. A demand for the grain or its value throws upon the warehouseman

the burden of offering substituted grain if he would not or cannot redeliver to the ticket holder the identical grain stored.

Storage ticket — holder of — warehouseman — bailment — title of grain — in ticket holder — demand for grain — official bond — breach.

4. As between the holder of the storage ticket and the warehouseman there exists a bailment, with the title of the particular grain in the holder of the ticket. Hence refusal to comply with the demand for delivery of stored grain sufficiently lays a basis for conversion in such respect as against the warehouseman and his sureties upon the breach of his official bond.

Default — proof — bond — certified copy — evidence — objections — in supreme court — waived — original bond — copy — sufficient.

5. Upon default and proof made by plaintiffs there was received in evidence without objection the warehouseman's bond, certified by the secretary of the board of railroad commissioners as "a true copy of the bond now on file in the office of" said board. Appellants now claim the same to have been inadmissible and insufficient as proof of the cause of action. *Held:*

(a) As no objection was made to the reception of this evidence, all objections thereto are waived.

(b) In any event, the statute governing the admission of certified copies of such official bonds was sufficiently complied with. And the copy constituted sufficient proof of the contents of the original bond.

Opinion filed May 31, 1916. Rehearing denied September 6, 1916.

Appeal from the District Court of Barnes County, *Coffey*, Judge. Affirmed.

M. J. Englert, for appellants.

That the plaintiff here demanded a return of his identical grain, and the warehouseman refused to return to him such grain, cannot be questioned. The statute in no sense authorized plaintiff to demand a return of his grain "so stored in the elevator." Comp. Laws 1913, § 3113.

Plaintiff should have demanded a return of the "kind, quality, and quantity" of the grain stored by him. This is the clear import of the statute. *Baker v. Born*, 17 Ind. App. 422, 46 N. E. 930; *Marshall v. Andrews*, 8 N. D. 368, 79 N. W. 851; Comp. Laws 1913, § 3116.

Warehousemen's bonds are to protect the holders of outstanding tickets. Comp. Laws 1913, § 3111.

Where grain is so stored, the statutes do not regard it as a sale. This law is for the protection of ticket holders for stored grain. Comp. Laws 1913, §§ 3112, 3113.

Winterer & Ritchie, for respondents.

The law does not contemplate that the demand shall be made in any particular form or words, but the demand for the grain is sufficient in itself, when the language used conveys to the party of whom the demand is made the meaning of the one making the demand. *Pattee v. Gilmore*, 18 N. H. 460, 45 Am. Dec. 385; *Sandefur v. Mattingly*, 16 Ark. 237.

Where a complaint shows plaintiff to be entitled to any relief, it is sufficient to repel a demurrer. The bond in question does not form a basis for the action.

It is the receiving and storing of the grain, the demand for it, and the refusal to deliver, which constitute the conversion,—the cause of action. The sureties and the bond are mere incidents to the main cause of action. *Hoskins v. Northern P. R. Co.* 39 Mont. 394, 102 Pac. 988; *Indianapolis v. American Constr. Co.* 176 Ind. 510, 96 N. E. 608; *Carthage Nat. Bank v. Poole*, 160 Mo. App. 133, 141 S. W. 729; *Hall v. Bell*, 143 Wis. 296, 127 N. W. 967; *Disbrow v. Creamery Package Mfg. Co.* 104 Minn. 17, 115 N. W. 751; *Matteson v. Wagoner*, 147 Cal. 739, 82 Pac. 436; *Sand Point v. Doyle*, 11 Idaho, 642, 4 L.R.A.(N.S.) 810, 83 Pac. 598; *Lamoure v. Lasell*, 26 N. D. 638, 145 N. W. 577.

A bond, such as is here involved, is not the basis of the suit in which the sureties are made parties. *Coffinberry v. McClellan*, 164 Ind. 131, 73 N. E. 97; *Realty Revenue Guaranty Co. v. Farm, Stock & Home Pub. Co.* 79 Minn. 465, 82 N. W. 857; *Malheur County v. Carter*, 52 Or. 616, 98 Pac. 489; *Hayt v. Bentel*, 164 Cal. 680, 130 Pac. 432.

The fact that a complaint refers to a given paper as an exhibit attached, and the exhibit is not attached, does not make the complaint bad for such reason. *Wall v. Galvin*, 80 Ind. 447; *Lynah v. Citizens' & S. Bank*, 136 Ga. 344, 71 S. E. 469; *Budd v. Kramer*, 14 Kan. 101; *New Idea Pattern Co. v. Whelan*, 75 Conn. 455, 53 Atl. 953.

The remedy in such case is by motion to make more definite. *Hadley v. Garner*, 116 App. Div. 68, 101 N. Y. Supp. 777; *De Galindez v. Ennis*, 149 Fed. 911.

The defendants demur to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. By so demur-

ring they admit the truth of all that is well pleaded in the complaint. *Foster County Implement Co. v. Smith*, 17 N. D. 178, 115 N. W. 663; *Baldwin v. Aberdeen*, 23 S. D. 636, 26 L.R.A.(N.S.) 116, 123 N. W. 80.

Goss, J. This is an action to recover of the sureties on a warehouseman's bond for the benefit of holders of storage tickets of grain, upon warehouseman's default in redeeming them. The complaint recites that one Lillethun owned and operated a public warehouse and elevator at Cuba, in Barnes county. That he had furnished the warehouseman's statutory bond in the sum of \$5,000, approved and filed, as provided by law, with the commissioners of railroads. That defendants were sureties thereon. That thereafter, at times stated during said year, Ertelt, Kunze, John Gruman, and Joseph Gruman delivered wheat in amounts stated, the elevator accepting it and issuing storage tickets therefor. That after demand therefor said elevator failed to redeliver said wheat to said ticket holders or pay them its value. That Lillethun is without property and has fled the country. Lillethun's default is pleaded as to each claimant in substantially the following language: "That during the time last above mentioned, and while said Lillethun was operating and conducting the said elevator, he received in store from relator Ertelt, 1,035 bushels of wheat, and upon the receipt and storage thereof did issue the said Ertelt his storage tickets therefor; that about the 26th day of June, 1910, and while Lillethun was engaged in the business of a public warehouseman, Ertelt did, at said elevator, make demand upon Lillethun for the return to him, Ertelt, of said grain so stored in the elevator of Lillethun; and that Lillethun did then and there refuse to return, or to offer to return, to him the said grain so stored by Ertelt, and that Ertelt did thereupon demand of Lillethun payment for said grain so stored by him in the elevator owned by Lillethun, and did then and there agree with said Lillethun that the value of the grain, less all charges, was the sum of \$847.68, the payment whereof the said Lillethun did then and there and at all times since has refused, neglected, and failed to make, and that the said Lillethun has converted the said grain to his own use." The complaint was demurred to as not stating facts sufficient to constitute a cause of action. The demurrer was overruled. The sureties appeal.

Their claim is that no default against the warehouseman is pleaded. They claim no conversion by him is shown of the grain for which the warehouseman's receipts were issued. That as § 3113, Comp. Laws 1913, provides that "nothing in this section shall be construed to require the delivery of the identical grain specified in the receipt so presented, but an equal amount of the same grade of grain or in lieu thereof a receipt issued by a bonded warehouse or elevator company doing business at terminal points for an equal amount of grain of the same grade; provided that grain placed in a special bin be excepted from the provisions of this section," it is claimed that to constitute conversion the demand for the grain must have been in the alternative, i. e., for the identical grain or for an equal amount of the same grade. That a failure or refusal to deliver the identical grain upon the demand therefor pleaded does not constitute conversion by the warehouseman for failure to comply therewith.

This statutory provision does not impose any additional burden as to demand upon the storage ticket holder for the return of grain or its equivalent. Rather the statute grants a privilege to the warehouseman of which he may avail if he does not have the identical wheat stored with him for redelivery. But the privilege is one that he must claim; not one that the ticket holder must negative by an alternative demand. In this connection it should not be overlooked that under § 3114, the delivery is a bailment, and not a sale, and that primarily in contemplation of statute the warehouseman has, or is presumed to have, the identical grain in store. And, as is stated in *Marshall v. Andrews*, 8 N. D. 364, 79 N. W. 851, in construing these same statutes, "While the statute recognizes the right of the bailee to at once ship the grain out of the warehouse, yet *as between the bailor and bailee the title to that particular grain remains in the bailor.*" Consequently, when the bailor demands his grain as title holder and owner, that grain must be furnished or the privilege offered by the statute to furnish like grain of the same grade must be availed of and a substitution offered. The burden is upon the warehouseman to offer the substitution if he would avail himself of the privilege and escape liability for a return of the same grain received, title to which as between him and the ticket holder remains in the latter. Therefore, when plaintiff demanded his wheat or its value, in case that demand could not be met, he made a

demand as broad as he was obliged to make to place the bailee of his grain in default as for a conversion of it upon neglect or refusal to comply with the demand made. A default of the warehouseman therefore is pleaded.

The second point made is that there is nothing in the complaint to show payment or tender of any charges for storage of the grain at the time that a demand for its return or payment was made. The elevator having the grain had the right to make a deduction for storage charges, either in grain or in cash. It was not incumbent upon the person holding the storage ticket to make a tender. The court will take judicial notice of the usual practice prevailing throughout the state for the warehouseman to make such deductions for storage and insurance upon settlement with the ticket holder. Besides the warehouseman by the agreement set up waived charges and stipulated the amount due the ticket holder, but defaulted in payment of the agreed amount due him.

The next assignment pertains to the failure to attach to the complaint, as a part thereof, the bond sued on, although the complaint was drawn in terms reciting that it had been so attached as "exhibit A." The complaint recites the giving of the statutory bond in the penal sum of \$5,000, as a public warehouseman's bond duly filed with and approved by the proper board therefor as custodian thereof; that said warehouseman owned and operated the elevator and was licensed by the state as a public warehouseman. That the defendants were his sureties upon his official warehouseman's bond, and the principal's default thereunder by his conversion of grain stored. This sufficiently pleads their liability as sureties. Upon findings as broad as the complaint in this respect the only conclusion of law to be drawn would be that the sureties were liable as such within the amount of the bond for its breach by the warehouseman. While the bond is a contract, nevertheless, the provisions of that contract are defined by law providing for and requiring its execution, delivery, and approval.

A further assignment is taken to the ordering of judgment upon the proof presented. Upon the overruling of the demurrer the defendants elected to stand upon the issue presented on the demurrer, and did not answer or participate further in the trial. But plaintiff offered proof, held by the court sufficient, to establish the facts pleaded in the complaint, and thereupon directed a verdict. A copy of the bond given by

Lillethun and signed and acknowledged by the defendant sureties was received in evidence, without objection of course. To the copy was affixed the following certificate:

This is a true copy of the bond now on file in the office of the board of railroad commissioners.

Thomas Hall, Secretary,

—with seal affixed.

Appellants claim that "this does not make this exhibit admissible in evidence, that this is not an official document and hence cannot be proved by a copy thereof, as provided by statute with reference to how official documents may be proved; that this exhibit would only be admissible in evidence, in its present condition, if the statute had so provided; that there is no provision in the statute permitting such evidence under such proof or under such circumstances."

It will be noticed that this is but an objection going to the admissibility of the proof already received in evidence, without objection on that score. It was evidence of what it purported to contain, irrespective of its authentication, and, once received, its weight was for the jury. But warehousemen's bonds given under the provisions of the statute are official bonds exacted by law, and as such are admissible when certified by the official custodian, under subdivision 6 of § 7919, which provides that official documents may be proved as follows: "Documents of any other class in this state, by the original or by a copy certified by the legal keeper thereof." This bond offered was sufficiently authenticated. Had the certificate read: "This is a true copy of the original bond now on file in the office of the railroad commissioners," the certificate would have been technically correct. The same thing is meant, although the word "original" is omitted. The bond was admissible in evidence, even against the objections made, none of which objections however were taken. We do not pass upon the necessity of making the proof of execution and delivery of the bond to support this judgment for a money demand. Assuming that necessity, the proof is sufficient. The judgment appealed from is in all things affirmed, with costs.

A. E. HECKER, as Trustee in Bankruptcy of Rose M. Geiger, Bankrupt, v. COMMERCIAL STATE BANK of Carrington, North Dakota, a Corporation.

(159 N. W. 97.)

Fire insurance policy — pledged — assigned — may be — orally or by writing.

1. A policy of fire insurance may be pledged or assigned orally, as well as by means of a written instrument.

Creditor — insurance policy — collateral security — insurable interest — goods.

2. A creditor who loans to a business concern money, and takes as collateral security to such loan an assignment or pledge of a fire insurance policy on the goods used by the borrower in the business for which the loan is made, has an insurable interest in said goods under the provisions of § 6466, Compiled Laws of 1913, which provides that "every interest in the property, or any relation thereto, or liability in respect thereof of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest."

Mercantile business — insurance policy — assignment — to creditor — collateral security — insurance — collection of amount — future advances — unlawful preference — Federal Bankruptcy Act.

3. A transaction in which the owner of a mercantile business gives to a creditor an assignment of an insurance policy, in order that such creditor may collect the amount thereof and apply the same to the payment of a prior loan, and which is given in furtherance of a prior agreement by which the insurance policy was pledged to the said creditor as security for money loaned and for future advances, and under the understanding that in case of fire such authority to collect or assignment should be given, is not an unlawful preference under the Federal Bankruptcy Act, even though made within four months of the act of bankruptcy, the money being loaned, and the policy having been pledged, prior to that time.

Opinion filed August 1, 1916.

Appeal from the District Court of Foster County, *Coffey, J.*

NOTE.—Upon the question of voidability of transfer within four months of bankruptcy, given pursuant to executory agreement antedating such period, see note in 17 L.R.A.(N.S.) 937, in which assignments of policies of insurance are discussed on page 939, the cases holding, in accord with the case above, that similar assignments are not unlawful preferences.

Action by trustee in bankruptcy to recover money claimed to have been paid under an unlawful preference. Judgment for defendant. Plaintiff appeals.

Affirmed.

George H. Stillman, for appellant.

It is the law, and the courts of this jurisdiction have adopted it, that choses in action cannot be pledged orally, but such pledge must be by a written instrument duly executed. *Sykes v. Hannewalt*, 5 N. D. 335, 65 N. W. 682; *Wright v. Ross*, 36 Cal. 414; *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237; *American Exch. Nat. Bank v. Federal Nat. Bank*, 226 Pa. 483, 27 L.R.A.(N.S.) 666, 134 Am. St. Rep. 1071, 75 Atl. 683, 18 Ann. Cas. 444; *St. Paul F. & M. Ins. Co. v. Brunswick Grocery Co.* 113 Ga. 786, 39 S. E. 483.

An interest in property, to be an insurable interest, must be either ownership of the property or of some lien upon or interest in same. This interest and the ownership of the insurance must unite in one person or there is no insurance. Rev. Codes 1905, § 5904, Comp. Laws 1913, § 6471.

Neither public policy, the law, nor our courts will permit of an oral pledge of a fire insurance policy. *New York v. Louisiana*, 108 U. S. 91, 27 L. ed. 662, 2 Sup. Ct. Rep. 176; *McCarter v. Firemen's Ins. Co.* 74 N. J. Eq. 372, 29 L.R.A.(N.S.) 1195, 135 Am. St. Rep. 708, 73 Atl. 80, 414, 18 Ann. Cas. 1048; *Foss v. Petterson*, 20 S. D. 93, 104 N. W. 915.

"A mortgage or transfer of his property by an insolvent debtor within four months of the filing of a petition in bankruptcy against him, which otherwise constitutes a voidable preference, is not deprived of that character or made valid by the fact that it was executed in performance of a covenant to do so made more than four months before the filing of the petition." *Wilson Bros. v. Nelson*, 183 U. S. 191, 198, 46 L. ed. 147, 151, 22 Sup. Ct. Rep. 74; *Re Sheridan*, 98 Fed. 406; *Re Dismal Swamp Contracting Co.* 135 Fed. 417; *Re Ronk*, 111 Fed. 154; *Pollock v. Jones*, 61 C. C. A. 555, 124 Fed. 163; *Johnston v. Huff, A. & M. Co.* 66 C. C. A. 534, 133 Fed. 704; *Re Mandel*, 127 Fed. 863; *Ragan v. Donovan*, 189 Fed. 138; *Page v. Rogers*, 211 U. S. 575, 53 L. ed. 332, 29 Sup. Ct. Rep. 159.

T. F. McCue, for respondent.

The appellant here only challenges the conclusions of law made by the trial court. Therefore, it is only for this court to say whether or not the judgment appealed from is valid, and the one which, under the findings of fact, the court should have entered. *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. 151; *Tribune Printing & Binding Co. v. Barnes*, 7 N. D. 591, 75 N. W. 904.

The policy of insurance here involved was formally assigned in writing; but this was not a new contract. It was merely carrying out an agreement that had long before been made by the parties.

"One by doing or undertaking to do what the law or a previous agreement requires him to do merits nothing, and it is not a consideration for anything." *Bishop, Contr.* § 48; *Chilson v. Bank of Fairmount*, 9 N. D. 99, 81 N. W. 33; *Roberts v. First Nat. Bank*, 8 N. D. 474, 79 N. W. 993.

A court will treat an agreement for pledge or bonds or other property as binding, and will give it effect according to the intention of the contracting parties. *White Water Valley Canal Co. v. Vallette*, 21 How. 414, 16 L. ed. 154; *Calhoun v. Memphis & P. R. Co.* 2 Flipp. 442, Fed. Cas. No. 2,309; *Spence v. Mobile & M. R. Co.* 9 Ala. 586; *Howard v. Iron & Land Co.* 62 Minn. 298, 64 N. W. 896; *Hamilton Trust Co. v. Clemes*, 163 N. Y. 429, 57 N. E. 614; *Harrigan v. Gilchrist*, 121 Wis. 361, 99 N. W. 909.

An insurance policy is not incorporeal property. It is corporeal property, and capable of delivery the same as a promissory note. A mortgage may be pledged without a written assignment. *Runyan v. Mersereau*, 11 Johns. 534, 6 Am. Dec. 393; *Fryer v. Rockefeller*, 63 N. Y. 276; *Williams v. Norton*, 3 Kan. 295.

Where the debt is evidenced by writing, a mere delivery of the evidence of the debt to the pledgee without any writing is sufficient. *Dickey v. Pocomoke City Nat. Bank*, 89 Md. 280, 43 Atl. 33; *Roberts v. First Nat. Bank*, *supra*.

A fire insurance policy may be assigned orally. *Howe v. Jones*, 57 Iowa, 130, 8 N. W. 451, 10 N. W. 299; *Moore v. Lowrey*, 25 Iowa, 336, 95 Am. Dec. 790; *Perkins v. Peterson*, 2 Colo. App. 242, 29 Pac. 1135; *Hight v. Sackett*, 34 N. Y. 447; *State v. Millner*, 131 Mo. 432, 33 S. W. 15; *Hoag v. Mendenhall*, 19 Minn. 335, Gil. 289.

The deposit or pledging or transferring of the policy of insurance with respondent did not transfer the title to the policy, nor to the goods covered or insured. The question of "insurable interest in property is not involved in this case." *Collins v. Dawley*, 4 Colo. 138, 34 Am. Rep. 72; *Pomeroy v. Manhattan L. Ins. Co.* 40 Ill. 398; Rev. Codes 1905, §§ 4950, 6194, Comp. Laws 1913, §§ 5493, 6771; *Roberts v. First Nat. Bank*, 8 N. D. 474, 79 N. W. 993; *Van Cise v. Merchants' Nat. Bank*, 4 Dak. 485, 33 N. W. 897.

The point of distinction as to what constitutes a preference right where property is transferred, pledged, or given as security within the limit of time preceding the bankruptcy proceedings, is that it is not in violation of the law if done pursuant to an agreement entered into prior to such time limit, but is regarded as having been done as of the date of such prior agreement,—a mere consummation of the former agreement. *Sabin v. Camp*, 98 Fed. 974; *Broughton v. Vasquez*, 73 Cal. 325, 11 Pac. 806, 14 Pac. 885; *Williams v. Clark*, 47 Minn. 53, 49 N. W. 398; *Bush v. Boutelle*, 156 Mass. 167, 32 Am. St. Rep. 442, 30 N. E. 607; *Chilson v. Bank of Fairmount*, 9 N. D. 99, 81 N. W. 33.

There being no proof here that the assets of the bankrupt were insufficient to pay her debts in full at the time of the commencement of this action, or that the money in controversy was required to pay such debts, the complaint is insufficient. *Prescott v. Galluccio*, 164 Fed. 618; *Jordan v. Stephenson*, 17 Iowa, 514; *Fox v. Dyer*, 3 Cal. Unrep. 139, 22 Pac. 257; *Bruker v. Kelsey*, 72 Ind. 51.

A complaint in an action to set aside a conveyance as fraudulent must allege that plaintiff is a creditor, or represents creditors. *Sawyer v. Harrison*, 43 Minn. 297, 45 N. W. 434; *Eller v. Lacy*, 137 Ind. 436, 36 N. E. 1088; *Ferguson v. Bobo*, 54 Miss. 121.

A trustee in bankruptcy must allege and prove that the estate is insufficient to pay the debts against the bankrupt. *Brumbaugh v. Richcreek*, 127 Ind. 240, 22 Am. St. Rep. 647, 26 N. E. 664; *Roney v. Conable*, 125 Iowa, 664, 101 N. W. 505; *Seager v. Armstrong*, 95 Minn. 414, 104 N. W. 480; *Schreyer v. Citizens' Nat. Bank*, 74 App. Div. 478, 77 N. Y. Supp. 494; *Lesser v. Bradford Realty Co.* 47 Misc. 463, 95 N. Y. Supp. 933; *Mueller v. Bruss*, 112 Wis. 406, 88 N. W. 229; *Level Land Co. v. Sivyer*, 112 Wis. 442, 88 N. W. 317.

BRUCE, J. This is an action brought by A. E. Hecker, the trustee in bankruptcy of Rose M. Geiger, bankrupt, to recover from the Commercial State Bank of Carrington, North Dakota, the proceeds of an insurance policy which was collected by the bank and applied to the payment of debts owing to it by the bankrupt. The case was tried to the court without a jury, and from a judgment in favor of the defendant and dismissing the action, the plaintiff appeals.

According to the findings of fact, which are in no way controverted by the appellant, on or about the 21st of September, 1911, and continuously thereafter until on or about January 3d, 1913, the defendant, Rose M. Geiger, conducted and operated a retail millinery business in the city of Carrington, North Dakota. On or about September 21st, 1911, she procured through the defendant, The Commercial State Bank of Carrington, a policy of fire insurance in the standard form on her stock and store fixtures, and which policy remained in the possession of the defendant bank, which paid the premium thereon and charged the same against her account. Later, and on or about March 12th, 1912, the said Rose M. Geiger borrowed from the defendant bank the sum of \$190, and gave her promissory note therefor. This note was signed by other persons as security. From that date and until September, 1912, the said Rose M. Geiger borrowed from the defendant bank additional sums of money, amounting in all to the sum of \$650. At the time of making the first loan of \$190, before mentioned, the said Rose M. Geiger deposited the policy of insurance before mentioned with the defendant bank under an oral agreement that it should be held as collateral security for the payment of the indebtedness due from her to the defendant, as evidenced by said promissory notes, and that in the event of the loss by fire of the property insured by such policy, the defendant bank should collect from the insurance company the amount of such policy and deduct therefrom the amount of the indebtedness to it. Later, and on or about September 21st, 1912, the policy above set forth expired, but there was issued to the said Rose M. Geiger a renewal policy in the same form, and which policy was deposited by the said Rose M. Geiger with the defendant bank under the same terms and conditions as the prior one, and which policy was retained in the possession of the defendant bank in accordance with the said agreement. Later, and on or about January 3d, 1913, the property insured was

destroyed by fire. Later, and on or about January 3d, 1913, and immediately following the loss, the said Rose M. Geiger executed and delivered to the defendant bank an assignment of said policy of insurance for the purpose of enabling such bank to collect the proceeds thereof, but such assignment was merely formal, and was given by the said Rose M. Geiger pursuant to the collateral security agreement before mentioned. Later, and on the 20th of January, 1913, the defendant bank collected the sum of \$934.75 on said policy from the insurance company, of which it retained the sum of \$650.25, which sum was the amount of the indebtedness due to the bank from the said Rose M. Geiger at such time, and, after extinguishing the debt due to it, paid over the balance in cash to defendant, Rose M. Geiger. Thereafter, and on or about March 13th, 1913, the said Rose M. Geiger was adjudged a bankrupt in the United States district court, and on May 9th, 1913, the plaintiff, A. E. Hecker, was elected and qualified as trustee. There is also a finding that at the time of the making of the loan by the defendant bank to the said Rose M. Geiger it had no knowledge of the financial condition of the said Rose M. Geiger; that prior to the date of the loss of the goods by fire, it made no special inquiries as to such financial conditions, but that, after such loss by fire, it learned that claims aggregating the sum of about \$1,000 were held against her for collection. There is also a finding that on or about January 3d, 1913, which was the date of the fire, the said Rose M. Geiger was insolvent, which insolvency continued until the time of the trial.

The first proposition which is urged by the plaintiff and appellant is that the oral agreement made by Rose M. Geiger and the defendant bank on March 12th, 1912, together with the deposit of the policy, did not constitute a pledge, and this for the reason that a policy of fire insurance may not be pledged orally, but only by a written instrument duly executed. Appellant, however, concedes that if the policy of fire insurance and its proceeds were properly and legally pledged on March 12th, 1912, and on September 21st, 1912, the date of the deposit of the renewal policy, he was properly defeated in the trial court, and his appeal should be dismissed. Plaintiff and appellant maintains in short that a policy of fire insurance is merely a chose in action, and that a chose in action cannot be pledged by an oral agreement merely.

We believe that there is no merit in this contention. It is true that

there is some support for it in the authorities, but the statements of recent years have been largely *dicta*. It now seems to be generally understood, indeed, that parol assignments of choses in action are valid, and especially of those which are themselves evidenced by written contracts, and which are capable of delivery. See 5 C. J. 900; *Roberts v. First Nat. Bank*, 8 N. D. 480, 79 N. W. 993; *Howe v. Jones*, 57 Iowa, 130, 8 N. W. 451, 10 N. W. 299; *Moore v. Lowrey*, 25 Iowa, 336, 95 Am. Dec. 790; *Runyan v. Mersereau*, 11 Johns. 534, 6 Am. Dec. 393; *Dickey v. Pocomoke City Nat. Bank*, 89 Md. 280, 43 Atl. 33.

A pledge is both an assignment and a transfer of possession. Oral proof of the assignment of the claim against the insurance company was certainly permissible. The formal written assignment which was made after the adjudication in bankruptcy was merely in furtherance of the original agreement. The insurance company made no defense on the ground of the illegality of the pledge, nor that in the first place there was no written assignment nor written agreement of pledging. It could have paid the claim and acknowledge the liability under the contract of insurance and the assignment of the right under the contract to the defendant bank, and this without any formal delivery or pledge of the policy to the bank whatever.

But plaintiff contends that the defendant bank did not have an insurable interest in the property covered by the policy, and that therefore any attempt to pledge or assign to it the rights under such policy was void. He cites the following sections of the Compiled Laws of 1913:

"Section 7471. The sole object of insurance is the indemnity of the insured and if he has no insurable interest the contract is void."

"Section 6466. Every interest in the property, or any relation thereto, or liability in respect thereof of such a nature that a contemplated peril might directly damnify the insured is an insurable interest."

These sections, however, do not support his contentions. The creditor bank had certainly an interest in the property which was of such a nature that a contemplated peril might directly damnify it. It is self-evident that a bank which loans money on the credit of an established and running business has an interest in the matter as to whether the assets of that business are consumed by fire. See *May, Ins.* 2d.

ed. § 108; *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 460, 24 L. ed. 253. No element of public policy is violated, indeed, by such an assignment or pledge. The policy was of course issued prior to its pledge or assignment. The money was loaned to the original insurer in order to enable her to continue her business and to weather her financial storms. Surely with the hope of such relief and after such relief, she would have less reason for destroying her property than if such help had not been obtainable. The temptation on the part of the owner who is pressed by many debts to burn his own property is certainly greater than that of a bank, which is generally but one of many creditors, to burn it for him.

Nor is there any merit in appellant's last point "that the oral agreement between Rose M. Geiger and respondent was ineffective for that it was not complete, as something more remained to be done to enable it to be carried into effect; to wit, a destruction of the property insured by fire and the execution of a written assignment following such destruction, and therefore it was in fact no more than an agreement for a pledge or assignment of the policy in the event of loss, and as such it must date from the date of the execution of the assignment and be construed as of that date; to wit, January 3d, 1913; and that date being within four months of Rose M. Geiger's adjudication in bankruptcy, such transaction was voidable in the suit of the trustee, appellant herein."

We have examined the cases cited by counsel for appellant and have no fault to find with the statements therein made that "a mortgage or transfer of his property by an insolvent debtor within four months of the filing of a petition in bankruptcy against him, which otherwise constitutes a voidable preference, is not deprived of that character or made valid by the fact that it was executed in performance of a contract to do so made more than four months before the filing of the petition." See *Cross, J., in Tilt v. Citizens' Trust Co.* 191 Fed. 449, quoting from *Re Great Western Mfg. Co.* 81 C. C. A. 341, 152 Fed. 123, 127. Nor have we any quarrel to make with the decision in *Ragan v. Donovan*, 189 Fed. 138, 146, wherein a debtor in 1904, under an oral agreement not to record the same, deposited with his creditor deeds to his property, and, in 1909, the deeds were recorded within four months of the filing of petitions in bankruptcy, and wherein it was said that

"delivery therefore was not complete and effective until some act was done which was within the contemplation of the parties and which ended Cahill's dominion over the papers. That act was to file them for record, which was an eventuality clearly within the plans of the parties when they were made. Then only was there delivery." These cases are not applicable to the one at bar, and for the reason that in the case which is before us the policy was actually pledged and the assignment actually made at the time of the delivery of the same. The mere formal assignment did not create the lien or pass the property. *Bush v. Bou-telle*, 156 Mass. 167, 32 Am. St. Rep. 442, 30 N. E. 607.

The judgment of the District Court is affirmed.

On Petition for a Rehearing (filed September 8, 1916).

Counsel for appellant files a petition for a rehearing in which, among other matters, he lays stress upon the provisions of § 6467 of the Compiled Laws of 1913, which we neglected to mention in the original opinion, and which provides that "an insurable interest in property may consist in: 1. An existing interest. 2. An inchoate interest founded on an existing interest; or 3. An expectancy coupled with an existing interest in that out of which the expectancy arises."

We merely refer to this fact to make it clear that the section was not overlooked, and that its perusal does not in any way lead us to modify our former opinion or the construction that we have given to § 6466 of the Compiled Laws of 1913. The petition for a rehearing is denied.

HODGE HEIRS and Their Guardian, by Their Local Agent, A. H. David, Appellant, v. C. H. ANDERSON, Defendant, and Adolph Allickson, Garnishee-Respondent.

(159 N. W. 79.)

Garnishment — execution — issued in aid of — jurisdiction — delivery to attorney — not to sheriff — no issuance.

1. Under the provisions of § 7568 of the Compiled Laws of 1913, an issuance of the execution is necessary to jurisdiction over a garnishee defendant when the garnishment is in aid of such execution, and it is not sufficient to merely

deliver it to the plaintiff's attorney, and there is no such issuance where the execution has merely been delivered to the plaintiff's attorney, and has not in turn been delivered by him to the sheriff or constable for execution.

Garnishment — right of — statutory — provisions — must be complied with.

2. The right of garnishment is merely a statutory right, and one who seeks to avail himself of it must conform to the provisions of the statute.

Opinion filed August 8, 1916. Rehearing denied September 8, 1916.

Appeal from the District Court of Pierce County, *A. G. Burr, J.*
Action in garnishment.

Judgment for garnishee defendant. Plaintiff appeals.

Affirmed.

B. L. Shuman, for appellant.

It is elementary that the caption is not controlling as to parties, for it is to be conceded that if the garnishee herein is entitled to be heard in any court subsequent to the trial in the principal action he would be obliged to look into the pleadings for a further disclosure as to parties plaintiff who are interested in the action. But plaintiff denies to the garnishee any such right at this time. If it is a misnomer of parties, as contended by the garnishee, he cannot be heard, for defendant has not objected, and hence would be bound by the judgment. 2 Enc. Pl. & Pr. 954; 17 Am. & Eng. Enc. Law, 1043, 1050; 20 Cyc. 1074.

There is nothing in the law upon issuing executions as to whom they shall be delivered. In legal effect it is "issued" when the clerk signs and seals it, in an official manner. It can be implied that it shall be under the control of the judgment creditor. 11 Century Dict. & Enc. p. 3200; Comp. Laws 1913, §§ 7713, 7718, 9115.

This matter involves the garnishee proceeding in aid of an execution, or such proceedings as may be had after the execution has been issued. Comp. Laws 1913, §§ 7568, 7572, 7719.

It is the law in some states that the execution be returned *nulla bona* before garnishment can issue; but in this state such a prerequisite is not required. 14 Am. & Eng. Enc. Law, p. 750; Comp. Laws 1913, § 7568.

Matters of form only are not material. Comp. Laws 1913, §§ 7421, 7569.

The date of the delivery of an execution is not a material matter

unless the statute so requires. 17 Cyc. 937, 986, 1034, 1076, 1077; *Jewett v. Sundback*, 5 S. D. 111, 58 N. W. 20; *First Nat. Bank v. Dwight*, 83 Mich. 189, 47 N. W. 111; *Peterson v. Wayne Circuit Judge*, 108 Mich. 608, 66 N. W. 487; *Smith v. Nicholson*, 5 N. D. 426, 67 N. W. 296.

R. E. Wenzel, for respondent.

An execution in this state must be directed to the sheriff or constable. Such officers are the only ones who have to do with executions. The command or mandate of the court runs to them. Comp. Laws 1913, § 9117; *First Nat. Bank v. Dwight*, 83 Mich. 189, 47 N. W. 111.

"An execution cannot be considered as being 'issued' until it is placed where it might have been executed, and some efficient act done under it." 17 Cyc. 1033 (d); *First Nat. Bank v. Dwight*, *supra*.

"A writ is not issued until it has been delivered to the officer who is to execute it." 17 Cyc. 1033 d-ii.

A garnishee has the right to know that an execution has been issued in such case. 20 Cyc. 1143 (b).

"If the execution is invalid, the garnishment is also invalid." *Kentzler v. Chicago, M. & St. P. R. Co.* 47 Wis. 641, 3 N. W. 369.

BRUCE, J. This is an appeal from the judgment of the district court of Pierce county vacating and setting aside a judgment of a justice of the peace, against the garnishee defendant, Adolph Allickson, on the ground that "no execution was issued in said action in support of which said garnishment issued by reason of the fact that same was not placed in the hands of a proper officer at the time of service of the garnishment papers upon the garnishee."

The only record that we have of the issuance of the execution is the entries in the docket of the justice of the peace that "on the 11th day of September, 1914, execution was issued in above-entitled action placed in hands of B. L. Shuman, *attorney for plaintiff*."

And again, "Garnishee appears specially in said action by his attorney, R. E. Wenzel, for the purpose of moving to quash the garnishment on the grounds stated in the written motion filed, and demands that a return be filed in this court upon the execution issued in the main action . . . motion of plaintiff overruled.

From this we must assume that all that was done was to deliver the

execution to the attorney, and the question to be determined is whether a delivery of such execution to the attorney, without a subsequent delivery to the officer who is to serve it, will justify the entry of a judgment against a garnishee defendant under the provision of § 7568, Compiled Laws of 1913, which provides that "either at the time of the issuing of a summons, or at any time thereafter before final judgment, in any action to recover damages founded upon contract, express or implied, or upon judgment or decree, *or at any time after the issuing in any case of an execution against property and before the time when it is returnable*, the plaintiff, or some person in his behalf, may make an affidavit stating that he verily believes that some person, naming him, is indebted to, or has property, real or personal, in his possession or under his control, belonging to the defendant, or either or any of the defendants in the action or execution, naming him, and that such defendant has not property in this state," etc.

There are also involved two other questions which were raised by a motion of the plaintiff to strike from the record the motion to quash which was interposed by the garnishee defendant, namely: (1) "That this is a collateral proceeding and does not permit the garnishee to make a collateral attack on the judgment. (2) That the garnishee is a mere stakeholder as between the parties to the action, and cannot, at this time, make any defense except as to the service upon himself and his liability to the defendant."

We are satisfied that an issuance of the execution is necessary to jurisdiction over a garnishee defendant when the garnishment is in aid of such execution, and that it is not sufficient to merely deliver it to the plaintiff's attorney. We are also satisfied that "an execution cannot be considered as being issued until it is placed where it might have been executed." 17 Cyc. 1033 (d).

The command indeed is to the sheriff or constable, and not to the attorney, and the attorney is by no means the agent of the sheriff or constable. Comp. Laws 1913, § 9117. Until that command is given, no execution has been issued. First Nat. Bank v. Dwight, 83 Mich. 189, 47 N. W. 111; Pease v. Ritchie, 132 Ill. 638, 8 L.R.A. 566, 24 N. E. 433; Peterson v. Wayne Circuit Judge, 108 Mich. 608, 66 N. W. 487; Freeman, Executions, § 9a; 10 R. C. L. 1241; 8 Enc. Pl. &

Pr. 433; *Barth v. Burnham*, 105 Wis. 548, 81 N. W. 809; *McDonald v. Fuller*, 11 S. D. 355, 74 Am. St. Rep. 815, 77 N. W. 581.

Section 9117, Compiled Laws of 1913, requires that "the execution must be directed to the sheriff or any constable . . . and bear the date of its delivery to the officer," and this surely does not mean the date of its delivery to the attorney. We do not mean to be understood as saying that an execution cannot be handed by the justice to the attorney for delivery to the officer, but merely that a delivery to this officer is necessary.

We are also satisfied that there is no merit in the contention that the motion to quash the garnishment could not be made, and this on the ground that it was a collateral attack on the judgment. It was not a collateral attack on the judgment. *Atwood v. Tucker* (*Atwood v. Roan*) 26 N. D. 622, 51 L.R.A.(N.S.) 597, 145 N. W. 587. It was merely an assertion that the plaintiff had not put himself within the statute. The right of garnishment is at the best a privilege to the creditor, and one which is often extremely burdensome to third parties who have no interest whatever in the litigation. It is not a common-law right. When one asserts a statutory right, he must put himself within the provisions of the statute, and if there is any case where this rule should be applied, it is in the case of garnishments.

The judgment of the District Court is affirmed.

WILLIAMS COUNTY STATE BANK, a Corporation, v. E. I. GALLAGHER.

(159 N. W. 80.)

Trial de novo — record on appeal — testimony — vague — indefinite — uncertain — new trial will be ordered.

Where, as in the case at bar, a trial *de novo* is asked under the provisions of § 7846, Compiled Laws of 1913, and the record is in such a condition that an intelligent disposition in the supreme court is impossible on account of the vague, indefinite, and uncertain state of the testimony, a new trial will be ordered in the district court.

Opinion filed July 13, 1916. Rehearing denied September 8, 1916.

Appeal from the District Court of Williams County, *Frank E. Fisk, J.*

Action to foreclose a chattel mortgage. Judgment for plaintiff. Defendant appeals.

New trial ordered.

H. W. Braatlien, for appellant.

This action is upon a note and chattel mortgage, brought by the plaintiff, payee, and defendant pleads no consideration. Under such state of facts, the real consideration is a proper subject of inquiry. *First State Bank v. Kelly*, 30 N. D. 84, 152 N. W. 125, and authorities; *Comp. Laws 1913*, § 5975; *Jeffers v. Easton*, E. & Co. 113 Cal. 345, 45 Pac. 680.

"The mere withholding of evidence, or failure to produce evidence which, under the circumstances would be expected to be produced, and which is available, gives rise to a presumption against the party withholding it." *Wylde v. Patterson*, 31 N. D. 282, 153 N. W. 630.

Parties who know of, or assist in the sale of, mortgaged chattels, cannot be permitted to come into court and plead ignorance of the records as to such sale. The finding that the note was given for "money borrowed" has no support in the evidence. *Comp. Laws 1913*, §§ 7277, 7286, 7528; *Swain v. Seamens*, 9 Wall. 272, 274, 19 L. ed. 559, 560; *Sykes v. Beck*, 12 N. D. 257, 96 N. W. 844; *Gallup v. Chelsea State Bank*, 35 S. D. 367, 152 N. W. 338.

The plaintiff cannot establish its case except through the medium of an illegal transaction to which it, by taking the notes, was a party. Its case must consequently fall. *Wald v. Wheelon*, 27 N. D. 624, 147 N. W. 402.

The bank elected to take the benefits from the illegal sale, and hence it assumed the obligations arising from it. *Comp. Laws 1913*, §§ 5866, 7157, and authorities cited; *St. Anthony & D. Elevator Co. v. Dawson*, 20 N. D. 18, 126 N. W. 1013, *Ann. Cas. 1912B*, 1337.

Palmer, Craven, & Burns, for respondent.

The bank would have no authority or power to assure that property owned by third parties was free from liens, and of course a bank cashier or agent could not bind the bank by any such assurance. 3 R. C. L. §§ 53, 71, *Banks, Power Cashier*.

BRUCE, J. This is an action to foreclose a chattel mortgage, and comes to us for a trial *de novo* under the provisions of § 7846, Compiled Laws of 1913.

The answer pleads a failure of consideration, and alleges that the note was given in the purchase of a certain horse which was sold at a public auction held under the direction of the plaintiff, and that such horse was afterwards taken from the defendant by the foreclosure of a prior chattel mortgage thereon, and the existence of which was not then known by or disclosed to him. Not only is a dismissal of the action asked, but also affirmative judgment for the expenses of time and money incurred in defending the title. The record, however, is such and the evidence so meager and unsatisfactory that we, on the trial *de novo* which is asked of us, are entirely unable to arrive at a satisfactory conclusion. As the record now is, indeed, we neither feel justified in decreeing a foreclosure of the mortgage nor a judgment on the counterclaim which is pleaded by the defendant, and for this reason and following the precedent set by the case of *Landis v. Knight*, 23 N. D. 450, 137 N. W. 477, are constrained to order a retrial of the action.

For the guidance of the parties on this trial we call attention to the fact that the facts surrounding the auction sale at which the horse was brought should be elucidated. Under whose authority was the sale conducted, who directed it, who was the auctioneer, and who the clerk, and by whom employed? What interest, if any, did the plaintiff bank have in the property which was sold? Why was the sale held at all, and what was said and done therein? How did the note and chattel mortgage to the bank come to be given? What was said and done between the parties at this time? Was the bank selling its own property or property in which it had an interest, or was it merely acting as a trustee of the funds? Was the note given in order to borrow money to pay Lysgaard for the horse, or was it given in payment of the horse and to the bank? What was the arrangement or agreement between the bank and Lysgaard?

A new trial is ordered. The costs of the appeal will abide the results of such new trial.

H. CASEMENT v. THOMAS CALLAGHAN.

(159 N. W. 77.)

Contract — minor — age — over eighteen years — voidable — enforceable — disaffirmance — when — statute.

1. Under the statutes of this state, the contract of a minor over eighteen years of age is not void, but merely voidable; and such contract is enforceable unless disaffirmed in the manner and within the time provided by law.

Infant — contract — avoidance — intent — act of disaffirmance — positive in character.

2. An infant desiring to avoid a contract must signify his desire and intent to do so, not only by refraining from any act of affirmance, but by performing some positive act of disaffirmance which is of such character as to clearly show his intention not to be bound by his act.

Opinion filed July 22, 1916. Rehearing denied September 8, 1916.

From a judgment of the County Court of Ward County, *Murray, J.*, plaintiff appeals.

Reversed.

Bradford & Nash, for appellant.

Respondent executed and delivered the note sued upon while he was a minor over the age of eighteen years. The contract was subject to repudiation and disaffirmance upon his restoring the consideration received by him or by paying its equivalent with interest. Comp. Laws 1913, § 4340.

The contract was merely voidable. *Luce v. Jestrab*, 12 N. D. 548, 97 N. W. 848.

Palda, Aaker, & Greene and *I. M. Oseth*, for respondent.

There is no question of estoppel here involved on account of retention of the consideration or the benefits of the contract by defendant, after his incapacity was removed. The cases holding to the contrary are predicated upon acts or omissions of the promisor after he attained his majority. 22 Cyc. 512, and cases cited.

Note.—As to necessity of returning consideration in order to disaffirm infants' contracts, see note in 26 L.R.A. 177.

On avoidance of infants' contracts, see note in 13 Am. Dec. 131.

"The power to ratify does not exist during infancy, but the ratification can be only after attaining majority." 22 Cyc. 539, 601, 602, and cases cited.

The indorsee cannot complain, for he is bound to know all the disabilities of the maker and the defenses available against the instrument connected with such disabilities. *McClain v. Davis*, 77 Ind. 419; *Downing v. Stone*, 47 Mo. App. 144, 27 Century Dig. 1173.

The effective act which determines the life and validity to the contract, if ratified, is the ratifying act, or equivalent failure to act, and not the original execution, and the ratification relates back to the date of the instrument. Conversely, a repudiation relates back to the execution, and renders the instrument void *ab initio*. 22 Cyc. 560, 602, and 607; *McCarthy v. Henderson*, 138 Mass. 310.

The law is loath to indulge in presumptions against infants, and the courts have always inclined to lay the burden of proving ratification upon him who claims it, under a voidable contract of an infant. 22 Cyc. 608, 613, note 11; *Hoyt v. Wilkinson*, 57 Vt. 404.

"Any act showing unequivocally a renunciation of, or a disposition not to abide by, a contract made during minority, is sufficient." 22 Cyc. 613.

"The thing to be delivered, if any, need not in any case be actually produced upon an offer of performance, unless the offer is accepted." Comp. Laws 1913, §§ 5811, 5821; *McPherson v. Fargo*, 10 S. D. 611, 66 Am. St. Rep. 723, 74 N. W. 1057.

"All objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor if not then stated." Comp. Laws 1913, § 5816.

CHRISTIANSON, J. This action was brought to recover upon a promissory note for \$400, executed and delivered by the defendant to one Ed King, on August 3, 1908, and by its terms payable to said Ed King, on November 1st, 1908, with interest at 12 per cent per annum.

The complaint is in the usual form, and alleges that plaintiff is the owner and holder of the note. The defendant in his answer admits the execution and delivery of said note as alleged in the complaint; but denies any knowledge or information sufficient to form a belief as to

whether plaintiff is the owner of the note, and alleges that if he is such owner, that he became so after maturity. Defendant further alleges that at the time of the execution and delivery of said note he was a minor; that said note was given as and for the purchase price of certain horses then and there purchased by defendant from said Ed King; that thereafter, during the month of November, 1908, he (defendant) offered to return to the plaintiff and to said Ed King (the payee named in said note) all the property which he (the defendant) had received for said note. That said offer of defendant was refused, and the horses remained in the possession of the defendant during the winter of 1908 and 1909, and that all of them died. The trial in the court below resulted in a verdict and judgment in defendant's favor, and plaintiff has appealed from the judgment.

The only questions presented on this appeal arise under the defense of infancy. Under the laws of this state males under twenty-one years of age and females under eighteen years of age are minors. Comp. Laws 1913, § 4335. And "a minor cannot give a delegation of power, nor under the age of eighteen make a contract relating to real property or any interest therein, or relating to any personal property not in his immediate possession or control." Comp. Laws 1913, § 4338. But, "a minor may make any contract other than as above specified in the same manner as an adult, subject only to his power of disaffirmance under the provisions of this chapter [chap. 2, Civil Code 1913], and subject to the provisions of the chapters on marriage and on master and servant." Comp. Laws 1913, § 4339. In all cases other than contracts for necessities for his support or that of his family, entered into by him when not under the care of a parent or guardian able to provide for him, or obligations entered into under the express authority or direction of the statute, "the contract of a minor, if made while he is under the age of eighteen, may be disaffirmed by the minor himself, either before his majority or within one year's time afterward; or in case of his death within that period, by his heirs or personal representatives; and if the contract is made by the minor while he is over the age of eighteen, it may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received or paying its equivalent with interest." Comp. Laws 1913, § 4340.

In construing these statutory provisions in *Luce v. Jestrab*, 12 N. D.

548, 97 N. W. 848, this court said: "The conflict which exists in judicial opinion elsewhere as to the legal effect of contracts of minors, and as to the steps necessary to avoid such contracts, has been removed in this state by statute. . . .

"It is entirely clear under § 2703, Rev. Codes 1899 [now § 4340, Comp. Laws 1913], that the contract of a minor who is over eighteen years of age is not void, but merely voidable,—that is, it is enforceable unless disaffirmed within the period and in the manner provided by the statute; and, further, that his liability rests upon his contract, and not upon a *quantum meruit*. . . . When he purchased the team he was over eighteen years of age. His contract, therefore, under the statute, was not void, but, as we have seen, was voidable at his option,—that is, it was enforceable until avoided by a disaffirmance; and it could be disaffirmed only in the manner provided by the statute."

An infant desiring to avoid a contract must signify his desire "not only by refraining from any act of affirmance, but by performing some positive act of disaffirmance, which is of such a character as to clearly show his intention not to be bound by his act." 22 Cyc. 554. See also 22 Cyc. 613.

In the case at bar it is conceded that the defendant was over the age of eighteen at the time he executed and delivered the note involved herein.

The following constitutes all the evidence offered by defendant in support of his contentions that he disaffirmed the contract and returned, or offered to return, the consideration received for the note. On direct examination, the defendant testified:

Q. Did you have any talk with Mr. King about these horses and this note you had that summer or fall before the note became due?

A. Yes, sir.

Q. That would be sometime in September?

A. Yes.

Q. What was the conversation?

A. I offered him his horses back. I had been working for him a year and I told him I would work a month free if he would give me my note back.

Q. What else was said?

A. He said he could not. He had put it up as collateral or something; that he did not have it then.

Q. Did you have conversation with the plaintiff about the note later on?

A. In the fall I did.

Q. Do you remember about what time? Was it in November or December, or when was it?

A. It was in October or November I should think; somewhere around there.

Q. What did you tell him?

A. I told him I could not pay the note and that I was not of age, and I offered to give him the horses back. He asked be where the horses were, and I told him up in the pasture, and I told him I would go up there and show him the horses if he wanted to see them, and he said he didn't want the horses.

Q. You say he said he didn't want them or did he say he would not take them?

A. I don't remember it. He said he did not want them and would not take them.

Q. He didn't take them?

A. No, sir.

Q. Did you offer to take him to the pasture where the horses were?

A. Yes.

Q. State as far as you can the whole conversation between you and Mr. Casement at that time?

A. He came into the barn up there, and he asked Mr. King if I was there, and he told him I was, and he said could be speak to me, and I was out in the back yard, and he called me in, and we talked. There was a little bedroom off the office. It was up about 6 feet, the wall was, and we went in there, Mr. Casement and I, and we sat down in the bed, and he asked me if I could pay any of that note, and I told him I could not. And he asked me where the horses were, and I told him they were up in the pasture, and he asked me if I still had them all, and I told him I had, and when he was going out then he said—I told

him I was not of age; I could not pay for the horses and he asked me if I could pay any, and I said I could not pay any, and I would take him up to the pasture and turn the horses over to him, and he would not have to foreclose, and he said he didn't want them, or would not take them, I don't know which.

Q. How far were they?

A. About half a mile to the first edge of the pasture.

Q. You came of age on the 4th day of February, 1909?

A. Yes, sir.

On cross-examination the defendant testified in reference to these conversations:

Q. Then what did you say?

A. I told him I would turn the horses over and that he would not have to foreclose on them, and he said—I do not remember whether he said he wouldn't take the horses or didn't want the horses, and I told him I would go up to the pasture and show them to him, and he said he didn't care to see them.

Q. You cannot recall now and you were not sure and you are unable to testify whether he said he would not take the horses or whether he said the other thing?

A. Yes.

Pat King, called as a witness for the defendant, when referring to this conversation testified:

Q. Did you hear that conversation or part of it?

A. I heard part of it.

Q. Where were they when you heard?

A. They walked out of the bedroom into the office where the pump was. I heard Mr. Callaghan telling him that the horses were up there in the pasture and he could go up and get them; he would go up and show him the horses and turn them over to him.

Q. He said to Casement he could go out there in the pasture to get them?

A. Yes. He could have the horses, they were in the pasture.

Q. What did Mr. Casement say?

A. I do not remember he was saying anything. He kind of shook his head or something like that. I do not remember him saying anything.

Q. The young man (Callaghan) said, "they are in the pasture; You may go up there and take them;" and Mr. Casement didn't say anything?

A. I think he shook his head.

Plaintiff's version of the conversation is entirely different from that of defendant. Plaintiff claims that defendant made no offer to return the horses, but agreed to pay \$80 by November 1st. It is conceded that defendant never returned the horses, and made no offer to do so other than the alleged offers mentioned in the foregoing testimony. And in his answer defendant alleges "that the offer of this defendant (to return the horses) was refused, . . . and that the said horses remained in the possession of this defendant," and that subsequently all of them died. Was there anything said by defendant or any positive act on his part which indicated an intent on his part to avoid the contract on the ground that he was a minor at the time he made it? We think not. When talking to King he recognized the validity of the contract, and sought to be released from its terms by making a new contract. When talking to the plaintiff, he also recognized the contract as subsisting and binding. He merely told the plaintiff that he could not pay the note, or pay anything on it; that the horses were in the pasture, and that defendant would go there and show plaintiff the horses if he wanted to see them; that defendant was not of age; that he could not pay anything on the note; that he would take plaintiff up to the pasture and turn the horses over to him so that he would not have to foreclose. After this conversation he continued to retain possession of the horses. Nothing further was ever said or done by defendant to indicate any intent or desire on his part to avoid or disaffirm the contract. In our opinion defendant's testimony fails to show any notice of disaffirmance, or any positive act on his part of such character as to manifest an intent on his part to disaffirm the contract.

The judgment appealed from is therefore reversed, and the court below is directed to enter judgment in favor of the plaintiff.

35 N. D.—3.

STATE OF NORTH DAKOTA EX REL. HENRY J. LINDE, as Attorney General of the State of North Dakota, and Otto Bauer, as a Taxpayer, Relators, v. THOMAS HALL, as Secretary of State of the State of North Dakota.

(159 N. W. 281.)

Capital removed — constitutional amendment — submission to vote — placing on ballot — original writ of injunction to prevent — initiative petition.

1. Original writ of injunction to prevent submission upon ballot at the coming general election of an amendment to § 215 of the state Constitution, to remove the seat of state government from Bismarck to New Rockford. A petition for such a constitutional amendment was filed with respondent, who, unless restrained, will submit said question to ballot. Relators assert that the petition filed is void, claiming that subdiv. 2 of § 202, state Constitution, is not self-executing; and hence that until legislation is passed to make it possible to operate under subdiv. 2, the Constitution cannot be amended by initiative petition.

Held: The legal sufficiency of the petition filed is a judicial, and not a legislative, question.

Petition — legal sufficiency — judicial question — filing — secretary of state — legislative agent — is not — performs only ministerial duty — reviewable in judicial proceedings.

2. In filing such a petition for, and in submitting to a vote, a proposition to amend the Constitution by initiative petition the secretary of state is not a legislative agent, and performs only ministerial duties reviewable in judicial proceedings.

Proposal of amendment — senate and house — by resolution — initiative petition — legislative province — does not involve — state sovereignty — ministerial act.

3. The proposal of constitutional amendments, whether by resolution of the senate and house of representatives or by initiative petition, is not legislation, and involves no legislative act or province, or power of state sovereignty; but is merely a duty ministerial in character, fixed by, and to be exercised only under and by compliance with, the terms of the Constitution.

Constitution — amendment — proceedings — validity of — judicial question.

4. Whether proceedings to amend a Constitution are valid as performed without such constitutional limitations is a proper judicial inquiry, and its determination by court decision is not an invasion by the judiciary of the constitutional

functions, province, and legislative duties of the legislative department of the government.

Constitution — not self-executing — mandate to legislature — amendments — laws — initiative petition — notice of — publication — signers — percentage required — rule of computation — not definitely fixed — enacting clause — substance or form of.

5. Subdivision 2 of § 202 of the state Constitution is not, and was not intended to be, self-executing; but is only a mandate to succeeding legislatures to provide laws whereunder the Constitution may be amended by initiative petition. This is the very apparent intention because:

(a) Subdivision 2 contemplates that the publication of notice of submission of such amendments shall be regulated and prescribed by future legislation.

(b) Subdivision 2 contemplates that legislation shall be enacted declaring the percentage of signers actually necessary to propose constitutional amendments, as the words of said subdiv. 2 "of at least 25 per cent" were intended to be but a limitation upon the legislature that at least 25 per cent should be required, but not to declare the percentage necessary, leaving that to future legislative action to determine the proper and necessary minimum percentage to be required, whether that percentage be 25 per cent, or more than 25 per cent.

(c) It is strongly indicative of necessity for future legislation that no definite rule for computation of any requisite percentage of signers is declared under subdiv. 2, while under the constitutional provision as to initiative of legislation the basis is there prescribed as "the whole number of votes cast for secretary of state at the regular election last preceding the filing" of the petition.

(d) The failure to mention or prescribe the substance or form of an enacting clause to constitutional amendments proposed by initiative petition, while the provision for initiative of legislation does prescribe the form of the enacting clause to be used, is strong evidence that future legislation would supplement said subdiv. 2 by defining the form of any enacting clause to be used thereunder.

(e) The history of its enactment, taken in the light of contemporaneous legislative action upon these and other concurrent resolutions introduced in or passing at the legislative sessions of 1911 and 1913, negatives an intent that subdiv. 2 should be self-executing.

(f) Our constitutional provisions were taken from the Oregon Constitution. The omission of the words found in the Oregon Constitution that would have made this provision self-executing, and then so interpreted there by court decision thereon, must be presumed to have been deliberate and intentional and for the purpose of preventing subdiv. 2 from being construed as self-executing.

Amendment to Constitution — by initiative proceedings — no law permitting — petition void.

6. As there is no law authorizing any amendment of our state Constitution

by initiative proceedings, the petition is void upon which the respondent threatens to submit this question to vote.

Submission of question — no law authorizing — injunction — courts should grant.

7. A court should enjoin submission of such a question where there is no law under which it could be legally submitted to a vote.

Petitioners — interest in matter — action — sufficient to maintain.

8. Petitioners have a sufficient interest to maintain this action.

Opinion filed September 11, 1916.

Original writ of this court is ordered issued to enjoin the secretary of state from submitting to vote a void proposition upon capital removal.

Miller, Zuger, and Tillotson, Newton, Dullam, & Young, and Benton Baker, and Sullivan & Sullivan for petitioners.

Lawrence & Murphy, T. F. McCue, J. J. Youngblood, Rinker & Duell, W. M. Jackson, J. S. Cameron, J. A. Manley, N. J. Bothe, and C. J. Maddux for respondent.

Goss, J. This court issued an order to show cause why it should not issue an original writ of injunction to stay further proceedings in capital removal instituted by the filing with the secretary of state of a petition for submission of a proposed amendment to § 215 of the state Constitution. Relator asserts among other things that the second subdivision of § 202 of our state Constitution, purporting to authorize initiative and referendum amendment thereof, is not self-executing, and therefore that said petition is void, and that submission of any proposition thereunder should be enjoined.

Respondent, secretary of state, asserts that this court is without jurisdiction or power to interfere with his official action, asserting that when so acting he is a legislative agent of the people and fulfils a legislative function in submitting said matter to vote; and that to stay submission of the question at the coming election, or to make any judicial inquiry as to the legality of the petition filed, is not only judicial interference with legislation in course of enactment, but it is an unwarranted and unconstitutional usurpation of legislative power by the judiciary.

This contention will be first noticed. It is premised upon the erroneous basic assumption that the enacting of a constitutional amendment

is an exercise of a legislative power confided as legislative subject matter upon the legislative department of government, as is ordinary legislation. While in a sense such may be a political or legislative matter for determination as a political question, *Red River Valley Brick Co. v. Grand Forks*, 27 N. D. 8-27, 145 N. W. 725, yet in its submission for adoption or rejection neither legislative province nor power is involved. Whether the people by initiative petition or by legislative proposal amend the fundamental law, they are in either instance "merely acting under a limited power conferred . . . by the people, and which might with equal propriety have been conferred upon either house, *or upon the governor*, or upon a special commission, or any other body or tribunal. The extent of this power is limited to the object for which it is given, and is measured by the terms [of the Constitution] in which it has been conferred, and cannot be extended by the legislature to any other object, or enlarged beyond these terms. . . . In submitting propositions for the amendment of the Constitution, the legislature is *not in the exercise of its legislative power or of any sovereignty of the people* that has been intrusted to it, but is merely acting under a limited power conferred upon it by the people." *Livermore v. Waite*, 102 Cal. 118, 25 L.R.A. 312, 36 Pac. 426, involving a capital removal from Sacramento to San Jose attempted by constitutional amendment; *Chicago v. Reeves*, 220 Ill. 274, 77 N. E. 237-240; *Collier v. Frierson*, 24 Ala. 108; and *Oakland Paving Co. v. Hilton*, 69 Cal. 479, 11 Pac. 3.

"The legislature in executing its functions [in proposing constitutional amendments] does not legislate in a technical sense. The result does not need the approval of the governor. *The duty is ministerial in character*. There is good reason why the manner of procedure so far as material—and the people must be presumed to have settled the question of what is material—must be followed. The power to make law, within fundamental limitations, is inherent in the division of the government formed for that purpose. It does not need any express grant, *but does not include making or proposing fundamental law*. The power to so propose is a special grant, and must be exercised within the scope of the grant." *State ex rel. Postel v. Marcus*, 160 Wis. 354, 152 N. W. 423.

A lucid exposition of this principle is also found in *Ellingham v.*

Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, and note citing much authority. Submission for adoption by ballot of a new Constitution proposed by the Indiana legislature was there enjoined. The syllabus reads: "The power to declare the law vested in the judicial department of government covers the whole body of law *fundamental* [constitutional] *and ordinary*, and hence whether a legislative action is void for want of power in that body, or because the constitutional forms or conditions have not been followed or have been violated, *may become a judicial question*, and hence the supreme court has jurisdiction to determine and declare that Acts 1911, chapter 118, providing for the submission by the legislature of a proposed new constitution to the vote of the electors, is void as not within the power of the legislature." This covers both the jurisdiction of courts over, and the propriety of the remedy of injunction against, submission of a proposed Constitution, when the result must be a nullity. Every contention of respondent is there answered, and the authorities are collected and analyzed so fully that but little, if anything, is left unsaid.

The same distinction is drawn in *Carton v. Secretary of State*, 151 Mich. 337, 115 N. W. 433, where it is said: "The constitutional convention is indeed the child of the law, *but of the organic law, and not a legislative enactment*. In this state the Constitution is the charter of the [subsequent constitutional] convention, and its sole charter."

For another recent decision to the same effect see *Crawford v. Gilchrist*, 64 Fla. 41, 59 So. 963, Ann. Cas. 1914B, 916. The syllabus reads: "A determination of whether an amendment to the Constitution has been validly proposed and agreed to by the legislature is to be had in a judicial forum where the Constitution provides no other means for such determination. The act of the secretary of state in publishing and certifying to the county commissioners proposed amendments to the Constitution is in its nature ministerial, involving the exercise of no discretion, and if the act is illegal it may be enjoined in appropriate proceedings by proper parties, there being no other adequate remedy afforded by law. Where an alleged illegal ministerial official act has relation to legislative action, such action may be considered by the courts in determining the validity or invalidity of the ministerial act. This is not an interference by the courts with the legislative department of the government." The opposite is true. *Mandamus* will not lie to

compel submission under the initiative of an ordinance which would be void if enacted. *State ex rel. Davies v. White*, 36 Nev. 334, 136 Pac. 110, 50 L.R.A.(N.S.) 195, and note. *Mandamus* was issued to compel election on recall petition ignored by city council where petition was legal and regular. *Good v. San Diego*, 5 Cal. App. 265, 90 Pac. 44. "The duty of the council is purely ministerial," and action can be compelled by *mandamus*. *Conn v. Richmond*, 17 Cal. App. 705, 121 Pac. 714, 719; *Kadderly v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222; *McBee v. Brady*, 15 Idaho, 761, 100 Pac. 97; *Vincent v. Mott*, 163 Cal. 342, 125 Pac. 346; *State ex rel. Lynch v. Fairley*, 76 Wash. 332, 136 Pac. 374; *State ex rel. Atty. Gen. v. Cunningham*, 81 Wis. 440-504, 15 L.R.A. 561, 51 N. W. 724; *Solomon v. Fleming*, 34 Neb. 40, 51 N. W. 304; *Cascaden v. Waterloo*, 106 Iowa, 673, 77 N. W. 333; *Macon v. Hughes*, 110 Ga. 795, 36 S. E. 247; *De Kalb County v. Atlanta*, 132 Ga. 727, 65 S. E. 72.

South Dakota, Oklahoma, and Colorado have apparently declared a different rule. *State ex rel. Cranmer v. Thorson*, 9 S. D. 149, 33 L.R.A. 582, 68 N. W. 202; *Threadgill v. Cross*, 26 Okla. 403, 138 Am. St. Rep. 964, 109 Pac. 558; *People ex rel. O'Reilly v. Mills*, 30 Colo. 262, 70 Pac. 322; and *Speer v. People*, 52 Colo. 525, 122 Pac. 768 (an affirmance by an equal division of justices). An election will not be enjoined for irregularities in the petition or procedure, as distinguished from an absence of law for the entire proceeding. *Pfeifer v. Graves*, 88 Ohio St. 473, 104 N. E. 529; *Duggan v. Emporia*, 84 Kan. 429, 114 Pac. 235, Ann. Cas. 1912A, 729.

But that the sufficiency of the petition is a judicial question, as well as the propriety of the remedy of injunction, has already been passed upon by this court in adjudicating the insufficiency of a petition for a state-wide referendum upon a legislative enactment, and holding it to be a judicial question, and in which proceedings in referendum were enjoined because void. *State ex rel. Baker v. Hanna*, 31 N. D. 570, 154 N. W. 704. On original writ this court therein declared: "As a referendum sets aside or suspends the will of the people as expressed by legislative act, petitions for a referendum should be required to comply strictly with the mandatory constitutional provisions under which a referendum is authorized. To require less is the equivalent of amending said constitutional provisions by court fiat, as well as to be derelict

in enforcing the Constitution itself." The cases cited in *State ex rel. Baker v. Hanna*, *supra*; *State ex rel. McNary v. Olcott*, 62 Or. 277, 125 Pac. 303; *State ex rel. Halliburton v. Roach*, 230 Mo. 408, 139 Am. St. Rep. 639, 130 S. W. 689; *Hammett v. Hodges*, 104 Ark. 510, 149 S. W. 667, and above authorities, also fully sustain that holding and these conclusions, *i. e.*, that the secretary of state acts but ministerially. Hence his acts in submitting proposed constitutional amendments to the electorate are subject to judicial review; and the same is in no sense invading or usurping any legislative function.

But counsel reasons that by abuse of judicial review legal passage of any constitutional amendment might be abridged or prevented through staying the process of its adoption, as by enjoining publication of notice or wrongfully and illegally keeping it off the ballot. However this may be, the question is but an incident of the fully recognized judicial power and province to determine constitutionality of legislative act and to declare laws unconstitutional. The same argument of alleged judicial domination of the legislative arm of government has been applied against that power and province of the judiciary. But it has always been accepted that the power to determine constitutionality of legislation is vested in courts, and that such is a judicial question pure and simple. *Ellingham v. Dye*, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 221, citing a page of authority. This question was settled in the pioneer case of *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60.

But possible results of an abuse of judicial power will not be presumed upon which to found a reason for denial of court review in such instances. Powers of a court of equity are not measured by what might be done through an arrogant and high-handed abuse of its legitimate authority. The following from *Worman v. Hagan*, 78 Md. 152-165, 21 L.R.A. 716, 27 Atl. 616, commenting upon a possibility of abuse of executive power as a factor in determining judicial issues presented is apropos. "It may be asked what is to be done in case the governor should violate his duty and wrongfully proclaim an amendment as adopted which in point of fact had been rejected. It would not be becoming in this court to suppose that such a contingency would ever happen. The courtesy due to the executive department forbids us to entertain such a conjecture."

Approved in *Gottstein v. Lister*, 88 Wash. 462-498, 153 Pac. 595,

testing constitutionality of the prohibition amendment to the Washington Constitution.

Learned counsel for respondent also contend that jurisdiction should be denied for the reasons (1) that all questions for decision are moot, as the people may by negative vote reject the proposed amendment; (2) that the proper exercise of judicial inquiry should be confined to passing upon the validity of amendments as passed, and not to interfere in the progress of their passage; and (3) that relator has shown no peculiar personal or financial interest in the proposed amendment sufficient to entitle him to maintain this action.

These objections were all advanced and answered in *Ellingham v. Dye*, *supra*. As to the first and second that court said: "If the legislature was without power to formulate and present the proposed organic law to the people, as we have seen it was, chapter 118 is void, and the mandate of that body that the ballot shall be encumbered with the question of its adoption is of no more force than that of any citizen without authority under the Constitution. The question involved is no more than whether ministerial acts threatened to be done in carrying out the provisions of an unconstitutional act may be enjoined. This, as we have seen, may be done. And there is also authority for the intervention of the courts before proposed constitutional changes have been passed upon by the votes of the electors, and the result declared;" citing *Carton v. Secretary of State*, 151 Mich. 337, 115 N. W. 429; *Wells v. Bain*, 75 Pa. 39, 15 Am. Rep. 563; *Livermore v. Waite*, 102 Cal. 113, 25 L.R.A. 312, 36 Pac. 424; *Holmberg v. Jones*, 7 Idaho, 752-758, 65 Pac. 563; *Tolbert v. Long*, 134 Ga. 292, 137 Am. St. Rep. 222, 67 S. E. 826, all closely parallel to this case at bar. These authorities also uphold a taxpayer's right to sue even though his financial hurt be so small as to amount to, as in *Ellingham v. Dye*, "but the price of a postage stamp." It is there said "the small proportionate sum of the cost of the election which would fall upon appellee as a taxpayer is not in itself sufficient to destroy his competency to sue. 'Where a suit is brought by one or more for themselves and all others of a class jointly interested, for the relief of the whole class, the aggregate interest of the whole class constitutes the matter in dispute.' *Brown v. Trousdale*, 138 U. S. 389, 34 L. ed. 987, 11 Sup. Ct. Rep. 308."

The same claim of want of interest could be advanced after a void

amendment had passed to an action to raise its invalidity. It would be hard to find a person having a special interest differing from that of every citizen and taxpayer, and the void amendment on such a standard of necessity of interest to sue for years might go unchallenged by one having power to do so, and constitutional rights of every citizen meanwhile be abridged.

Having jurisdiction to proceed with this inquiry, the all-important question propounded by petitioners will be answered. If their contention is sound, that the second subdivision of § 202 of our fundamental law but authorizes legislation facilitating amendments thereto by initiative, and is not self-executing, and therefore inoperative, as yet no such legislation having been provided, it follows that no valid petition to initiate a constitutional amendment has been filed, and the threatened act of the secretary of state would in any event but result in a nullity. In other words, the question presented is whether subdiv. 2 of § 202 of our Constitution, as amended, is self-executing. The following, taken from Cooley's Constitutional Limitations, was adopted in State ex rel. Ohlquist v. Swan, 1 N. D. 5-13, 44 N. W. 492, as one test as to whether a constitutional provision is self-executing, viz: "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles without laying down rules by means of which those principles may be given the force of law." This test is settled law, and nearly every case on the subject quotes it. "It has been said that the question in every case is whether the language of a constitutional provision is addressed to the courts or to the legislature. Willis v. Mabon (Willis v. St. Paul Sanitation Co.) 48 Minn. 140, 16 L.R.A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110; State v. Kyle, 166 Mo. 287, 56 L.R.A. 115, 65 S. W. 763. A provision that the legislature should make suitable provisions for carrying a constitutional amendment into effect is obviously addressed to the legislature, and is indicative of the intention that such amendment should not become effective until made so by an act of the legislature." 6 R. C. L. 58: citing Tuttle v. National Bank, 161 Ill. 497, 34 L.R.A. 750, 44 N. E. 984; State ex rel. Toledo v. Lynch, 88 Ohio, St. 71, 48 L.R.A. (N.S.) 720, 102 N. E. 670, Ann. Cas. 1914D. 949; Ex parte Wagner, 18 Ann.

Cas. 197, and note (21 Okla. 33, 95 Pac. 435) and also note to 7 Ann. Cas. 628. "One of the recognized rules is that a constitutional provision is not self-executing when it merely lays down general principles, but that it is self-executing if it supplies a sufficient rule by means of which the right which it grants may be enjoyed and protected, or the duty which it imposes may be enforced without the aid of a legislative enactment. In other words, it must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the Constitution itself, so that they can be determined by an examination and construction of its terms, *and there is no language indicating that the subject is referred to the legislature for action.*" 6 R. C. L. 59, citing Willis v. Mabon, *supra*. "Indeed the question has been said to be one of intention in every case." 6 R. C. L. 57, citing Illinois C. R. Co. v. Ihlenberg, 34 L.R.A. 393, 21 C. C. A. 546, 43 U. S. App. 726, 75 Fed. 873; Tuttle v. National Bank, 161 Ill. 497, 34 L.R.A. 750, 44 N. E. 984; Newport News v. Woodward, 7 Ann. Cas. 625, and note, (104 Va. 58, 51 S. E. 193). "A constitutional provision is self-executing where no legislation is necessary to give effect to it." 6 R. C. L. 57; State v. Caldwell, 50 La. Ann. 666, 41 L.R.A. 718, 69 Am. St. Rep. 465, 23 So. 869. And the nature of the subject matter may also be decisive of the question, as instanced by constitutional guaranties of personal rights and liberties, merely rules of law operating directly as self-executing mandates and guaranties. But with such we are not concerned, they being without the scope of the inquiry, as subdiv. 2 of § 202 under consideration purports to relate to procedure, *viz.*, the method to be followed and the conditions imposed in amending our fundamental law by the initiative.

Applying these tests, we inquire: (1) Was it the intent of those adopting said subdiv. 2 that it should be considered as addressed to the legislature for that body to provide legislation to make it effective by defining its use, safeguarding against its abuse, and further the expressed intention of the amendment, or, instead, should it be considered as any other law and addressed to the court? If the former, it is not self-executing; if the latter, it is. Then again: (2) Does it by its terms indicate that the legislature shall supplement it by procedure necessary to make it effective, or, on the contrary, is it so complete that it "supplies a sufficient rule by means of which the right which it grants

may be enjoyed and protected or the duty which it imposes may be enforced without the aid of legislative enactment?" These questions must be answered, if possible, from the language of the constitutional provision itself, but if that is ambiguous or the answer doubtful, then the field of inquiry is widened, and rules applicable to construction of statutes are to be resorted to. In fact, a wider field of inquiry for information is proper where needed in construing constitutional provisions than legislative enactment. "Constitutions are to be construed as the people construed them in their adoption, if possible, and the public history of the times should be consulted and should have weight in arriving at that construction," are the words of that eminent jurist, Judge Cooley, *People ex rel. Bay City v. State Treasurer*, 23 Mich. 499, quoted and approved last year in a case closely parallel to this in facts in *State ex rel. Blakeslee v. Clausen*, 85 Wash. 260, 148 Pac. 28, Ann. Cas. 1916B, 810. And is there any ambiguity in subdiv. 2 of § 202? Is there any necessary thing omitted therefrom? Is it complete or incomplete? It reads, so far as material to this inquiry: "Any amendment or amendments to this Constitution may also be proposed by the people by the filing with the secretary of state *at least six months* previous to a general election of an initiative petition containing the signatures of *at least 25 per cent* of the legal voters in each of *not less than* one half of the counties of the state. When such petition has been *properly* filed, the proposed amendment or amendments shall be published *as the legislature may provide* for three months previous to the general election and shall be placed upon the ballot to be voted upon by the people at the next general election." The well-established rule for construction of constitutional law is "that constitutional provisions, like statutes, always operate prospectively, and not retrospectively, unless the words used or the objects to be accomplished clearly indicate that a retrospective operation was intended." 8 Cyc. 745. As there is nothing in the constitutional provision to indicate any reference was had by it to past legislation, how did those adopting this provision intend notice of proposed amendments to be given? The answer, in the language of this constitutional provision, is "as the legislature *may* provide." And does this mean as the legislature has provided or, instead, as the legislature shall by future enactment provide? Again the constitutional mandate, necessarily mandatory and prohibitive be-

cause under § 21 of the Constitution: "The provisions of this constitution are mandatory and prohibitory *unless by express words they are declared to be otherwise*"—emphatically answers "as the legislature *may* provide," necessarily indicative of future legislative provision for publicity of such proposed amendments before any shall be submitted for adoption under this subdivision.

In scanning this constitutional provision as to whether it is or was intended to be complete as to procedure, and, as such, ready-made for use without further legislation, it is also noticeable that the necessarily ministerial duty of determining whether the petition invoking the power of amendment of the Constitution is sufficient to be "properly filed" is made to depend entirely upon whether it contains "the signatures of at least 25 per cent of the legal voters in each of not less than one half of the counties of the state." This is the only constitutional measure of its sufficiency. The question then naturally arises from what and upon what basis shall the secretary of state compute its sufficiency as to numerical requirements? The answer is by "(all) the legal voters in each of not less than one half of the counties in the state." But how many legal voters are there in each of said counties, and how shall their number be determined? The legislature knew that this standard was, even if certain, hard of ascertainment, and not provided for by general law applicable to this constitutional provision. Otherwise, why did they, in proposing and adopting the corresponding initiative and referendum amendment as to legislation, amending § 25 of art. 2 of the state Constitution, adopted by the same two legislatures and considered at the same times and as a companion measure to this subdiv. 2, find it necessary to particularize by inserting in a much more definite, lengthy, and complete constitutional amendment a measure of computation of ordinary legislation in the words, "The whole number of votes cast for secretary of state at the regular election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted." Why was such omitted here if it was considered so complete as to be self-executing? Shall we find that, notwithstanding this definite provision in less important initiative constitutional guaranties, the legislature and the people in adopting this subdiv. 2 did so with an intent that it should be left without definite rule as to

means of ascertainment and for the conjecture or ascertainment in any way possible of the respondent. Certainly a census or enumeration was not intended to be taken. Yet how without that, in a close case as to numbers, can that officer ascertain, with such a degree of exactness as should be required when proceedings looking to the alteration of the Constitution itself is in course of progress, facts necessarily involving computations and enumerations in at least twenty-six different counties, or one half the counties of the state? If future legislation declaring some standard for guidance and computation was not intended, then why, may we ask, was the same legislature so specific in the less important constitutional provision as to initiative and referendum of ordinary legislation? In the light of what it did as to the latter, it cannot be said that failure to be more definite here was the result of oversight. Rather, such discriminating particularity evidences an intentional deliberate omission. The more reasonable conclusion must be that here, as in also the matter of publication of notice of the proposed amendments, it was intended only to grant a mandate to succeeding legislatures to carry subdiv. 2 into effect by appropriate legislation.

And this conclusion is further strengthened when it is found that neither the form nor the substance of the enacting clause is provided for an initiative petition to be filed under subdiv. 2. If this was the only uncertainty, it might be doubtful whether it alone would warrant the determination that future legislation was intended before it should be held self-executing, but it is especially significant that these matters are here omitted, while the corresponding amendment as to initiative of legislation has provided both for an enacting clause and its form, by the following: "The enacting clause of the initiative bills shall be, 'Be it enacted by the people of the state of North Dakota.'" What should be the enacting clause for proposed amendments by initiative under subdiv. 2? Should it read: "Be it resolved by the people of the state of North Dakota," or "Be it resolved by the people of the state of North Dakota with the senate and house of representatives thereof concurring?" Or is an enacting clause to be omitted entirely; if so, what in the petition for initiative is to indicate the action taken?

Another question arising is whether the constitutional amendment proposed by initiative is to be printed in full upon the ballot or the substance thereof merely stated in general terms, requiring resort to the

original initiative petition filed. Subdiv. 2 is silent as to these important matters of procedure. Is not this omission further indication that matters of detail were to be left to the legislature, and that, in the language of the authorities, subdiv. 2 is "addressed to the legislature?" It would seem so.

That a court is justified in resorting to concurrent acts of the legislature or matters of legislative and current history known to all men of ordinary understanding and intelligence at the time of the adoption of this subdivision 2 has the sanction of all authority. "In ascertaining the intent in adopting an amendment to the Constitution providing for the referendum of new laws, courts may resort to the history of such legislation, the contemporaneous construction, the changes made, the context and subject matter, and the purpose and spirit of the act, and the form in which the idea has been fashioned in other states." Syllabus in *State ex rel. Blakeslee v. Clausen*, 85 Wash. 260, 148 Pac. 28, Ann. Cas. 1916B, 810. In the opinion it is there said: "Following an agitation sustained by persistent propaganda the plan [initiative and referendum] was framed in words and adopted as a part of the fundamental law in several states of the Union. The state of Washington, though not the first to adopt an amendment to its Constitution, did not borrow the idea from any of the states which had adopted it. The agitation in its favor did not ripen quite so soon in this state; but, at the time other states adopted it, the idea of direct legislation was a live question which, like most questions of great public interest, became so persistent that it could be settled only by adoption or rejection. It must be kept in mind that the theory of direct legislation and the referendum is a thing neither new nor original. On the other hand, the purpose, the limitations on the legislature, and reservations of the people attempting its exercise, are to be gathered from the words, context, subject matter, reason, and spirit of the enactment, just as any other law or declaration of fundamental right is to be ascertained. In ascertaining the purpose and its limitations and reservations we may well look to the form in which the idea has been fashioned in other states *and their experiences*, assuming that the legislature and the people had these in mind, and if evil, that they intended to avoid them; if good, that they intended to adopt them. . . .

"Several years before the legislature submitted the amendment to

our Constitution the people of Oregon had adopted the initiative and referendum with practically no limitations. . . . It was a matter of common knowledge that under this unbridled license to refer legislation the state university had been denied the benefit of an appropriation for its support and maintenance. That one of the state institutions, exercising an essential function of the state, had been crippled and embarrassed, and but for the pledge of private credit would have been destroyed for a time at least. . . . We may well assume that the people of this state had no intention of falling into the error that Oregon had made, and so framed their Constitution that our government and its institutions should not be put to the embarrassments that might follow an agitation which could be supported and a vote compelled by a number of electors so small that it may be said to be merely nominal." This is recited as well illustrative of the right of courts to resort, in construing constitutional provisions, to matters of history and experience had by other states from the adoption of similar principles as a part of their Constitutions. The importance of this will develop later in a comparison of similar constitutional provisions with our own, developed from, if not taken almost verbatim from, the same constitutional provisions of Oregon discussed in this Washington case.

Under this situation, with the duty confronting us of taking judicial notice of the source from which sprung our constitutional provisions as to initiative of constitutional amendments and initiative and referendum of ordinary legislation and similar contemporaneous legislative action, which includes, besides our present two constitutional and statutory initiative amendments, all those additional concurrent resolutions that passed the legislature of 1911, providing for recall of the judiciary and all public officers by popular vote, and introduced by Senator Bessen as a companion measure to chap. 93, of the Session Laws of 1911, introduced by the same gentleman, providing for a wide-open initiative and referendum on all legislative matters, and which has become our present constitutional amendment as to initiative and referendum on legislative matters; and again that the same legislature passed chap. 94, a house bill, introduced by Representatives Doyle and Ployhar, providing for recall of all public officers, and legislation by the initiative and referendum of all kinds of legislation; and for the future adoption of amendments to the state Constitution, and amended pro-

cedure in impeachment, all in one lengthy and elaborate concurrent resolution,—each and every of these provisions specifically and carefully provide that they shall be self-executing, in words or effect that “this amendment shall be self-executing, but legislation may be enacted especially to facilitate its operation,” and showing not only an expressed intent, but careful attention, to provide that they should be self-executing, and as guarding against leaving anything essential for future legislatures to make operative, should they become fundamental law.

All this legislation is what may be properly termed radical in kind. The counterpart is conservatism, and we find that these same legislatures, besides submitting these radical measures, also submitted a conservative proposed constitutional amendment to § 202, and which has without change become § 202, including subdiv. 2 thereof. And the significant fact is that § 202, as so proposed and passed, has wholly failed to provide, except by barest and uncertain inference, if at all, that it shall be self-executing, while all the radical amendments specifically declare in common and exact language: “This amendment shall be self-executing, but legislation may be enacted to facilitate its operation,” language found verbatim in the initiative and referendum constitutional amendments of the Constitution of Nevada, also earlier taken from Oregon, *State ex rel. Dotta v. Brodigan*, 37 Nev. 37, 138 Pac. 914. The plain concurrent resolution, and the recall, and general initiative measure, the Ployhar bill, House Bill No. 133 of the 1913 legislature, all failed of adoption in the 1913 legislature. While the Gibbens bill, chap. 89, Session Laws 1911, and the Bessesen initiative and referendum as to legislation, concurrent resolutions, passed both legislatures and a vote of the people, and are constitutional amendments. This omission in the Gibbens measure, the present § 202, to provide that it shall be self-executing, is significant, in view of the fact that two legislatures had all these various principles before them. This omission was by no mere accident. The measure itself was a conservative one and intended to be such, and as such it was not intended to be self-executory. And the history of these measures in the 1913 legislature is strongly corroborative of this conclusion. The constitutional section under discussion was again there introduced in original form by Senator Gibbens as senate bill No. 73. It early passed the senate and was messaged to the house. The house had passed the Ployhar-Blakemore

bill as house bill No. 133, the original Ployhar-Doyle resolution passing the 1911 legislature, and this measure providing for the initiative and referendum, recall, and a provision for impeachment, the 1913 Senate repeatedly refused to pass; while the house, to coerce the senate, then refused passage of not only senate bill 73, this constitutional amendment measure, but senate bill 32, introduced by Senator Overson, the original Bessesen measure as to initiative and referendum of legislation, which had been passed as senate bill 93 of the 1911 session, and is our present constitutional amendment providing for the initiative and referendum of legislation. Late on March 7th, 1913, the last legislative day of that session, and during the last closing hour of the senate session, an attempt was made to pass house bill 133, the Ployhar-Blakemore measure. It failed in passage, and thereby there was passed up to the House of Representatives all responsibility for the defeat of all such legislation. The house recanted, and as a result senate bill 32 and senate bill 73 were passed at the very close of the 1913 session, and were messaged to the senate and signed. Consult Senate Journal, pp. 1547-1601, and 1619, and House Journal, pp. 2005, 2006 and 2063-2066, 2071, 2072. All these bills were hotly debated in every phase and very carefully and thoroughly considered and discriminately acted upon, the radical measure as to constitutional enactment being refused passage, while the conservative one was approved. And as a matter of current history it was known that the opposition to the enactment of any measure to permit constitutional amendment by initiative petition was strongly opposed by many firm believers in the prohibition plank, § 217 of our state Constitution, which prohibitionists considered might be jeopardized by any initiative system for constitutional amendment. Such opposition to the more radical measure in all probability caused its defeat, and the adoption instead of the constitutional amendment containing subdiv. 2 of § 202. In its formulation care was used that it should not be self-executing, and that the percentage of signers required should be comparatively high. And this leads to another and probably all-sufficient reason in itself to declare this provision not self-executing, strongly evidencing the legislative intent that future legislation was necessary to make it effective. We refer to the percentage required, and *which is uncertain*. A petition must contain signatures "of at least 25 per cent." *This is merely declar-*

atory of a minimum, leaving to subsequent legislation to fix the minimum, which must be "at least 25 per cent," and to classify and vary accordingly, if necessary, any required percentage to initiate different amendments to the Constitution as legislative wisdom may regard necessary in view of widely different constitutional subject matter. To illustrate, it is probably within the grant of legislative authority by subdiv. 2 for the legislature to declare necessary a higher percentage to initiate a constitutional amendment to operate to change the seat of government of this state or the state university, the state agricultural college, its normal schools, and other public institutions fixed by the Constitution, or to amend the prohibition constitutional guaranty, than would be necessary to initiate a rule for taxation. *Engstad v. Grand Forks County*, 10 N. D. 54, 84 N. W. 577. All this was intended to be left to future legislative wisdom, with the limitation that "at least 25 per cent of the legal voters in each of not less than one half of the counties of the state" should be required in any event, but that the actual percentage to be required to operate under subdiv. 2 should be fixed by legislative act. And the same is probably equally true as to the period before an election at which an initiative petition to amend fundamental law shall be required to be filed. It is doubtful if it was intended to be left as indefinite for operative purposes as declared by the words of subdiv. 2, the only requirement as to time being "at least six months previous to a general election." Would the filing of a petition one year and six months or two years before a general election be sufficient compliance with this provision? Likewise, it was left to legislative discretion to determine what should be placed upon the ballot in voting upon such a proposed amendment.

But not only does the history of the enactment and of the times point to this conclusion, but still even more conclusive reasons exist. Oregon was looked to as the place of origin of not only these *ideas*, but as the place from which these constitutional provisions themselves were taken. They had been tried there for years. As early as 1904 in *Kaddery v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222, this legislation had been passed upon and held not to be in conflict with § 4 of article 4 of the United States Constitution guarantying to every state a republican form of government. Since 1902 the Constitution of that state had contained the initiative and referendum provisions whose phraseology

is very closely followed by our measures. And the supreme court of that state as early as 1907 had held Oregon's constitutional provision self-executing in *Stevens v. Benson*, 50 Or. 269, 91 Pac. 577. So all that was necessary to have our subdiv. 2 of § 202 self-executing beyond all doubt was for our legislature to borrow the remainder of the constitutional provision, and provide in this act, as in chap. 86, Session Laws 1911, the Plain resolution, that "the secretary of state and all other officers shall be guided by the general laws and this act in filing and submitting initiative and referendum petitions until legislation shall be especially enacted therefor." The Oregon constitutional provision reads: "Petitions and orders for the initiative and for the referendum shall be filed with the secretary of state and in submitting the same to the people he *and all other officers shall be guided by the general laws and the act submitting this amendment until legislation shall be especially provided therefor.*" Notice their almost identical as well as peculiar phraseology. This has been held self-executing in *Stevens v. Benson*, supra. The same legislature in 1911 adopted it almost verbatim as to the Plain bill and also as to the Bessesen measure, our present constitutional provision as to initiative and referendum of ordinary legislation. There can be no doubt that this language came from the Oregon initiative constitutional provision quoted. But not content with that, the last clause of the present constitutional provision as to legislation states: "This amendment shall be self-executing, but legislation may be enacted to facilitate its operation." If the companion measure to subdiv. 2 was carefully made *self-executing*, and subdiv. 2 was not intentionally made *not* self-executing, why was this provision purposely and deliberately eliminated or omitted from subdiv. 2, while found in the corresponding amendment as to legislation, which also was made doubly certain by an explicit declaration that it should be self-executing.

Oklahoma has held in *Ex parte Wagner*, 21 Okla. 33, 95 Pac. 435, 18 Ann. Cas. 197, that an identical omission by their legislature while adopting the *same* provision to their Constitution from the *same* source was in itself sufficient evidence of a legislative intent that similar constitutional provisions should *not* be self-executing. Upon that ground that court held them not self-executing. And Missouri in *McGrew v. Missouri*, P. R. Co. 230 Mo. 496, 132 S. W. 1077, declares to the same

effect in the following language: "The general rule is that where one state borrows a constitutional provision from another state that has previously been construed by the courts of the latter state, such construction is presumed to have been adopted along with the provision; the reason for said rule is that if it were intended to exclude the previous construction, the legal presumption is that the terms of the provision *would be so changed as to effect that intention.*" This is only what was done and in law presumed as intended by the omission mentioned in failing to embody in subdiv. 2 of § 202 the Oregon provision making it self-executing, already construed in that state and adopted almost literally in the corresponding amendment authorizing the initiative as to ordinary legislation.

And this is no new rule of statutory or constitutional construction. In *Fitzmaurice v. Willis*, 20 N. D. 372, 127 N. W. 95, on an election statute construed in Wisconsin before its adoption here, it is said: "We are of the opinion that the Wisconsin authorities cited are controlling in this case," and all the votes cast in the city of Kenmare were thrown out, resulting in creating the county of Renville. See also *Com. v. Hartnett*, 3 Gray, 450; *Pennock v. Dialogue*, 2 Pet. 1, 7 L. ed. 327; *Hogg v. Emerson*, 6 How. 437, 482, 12 L. ed. 505, 524. And in *State ex rel. Dotta v. Brodigan*, 37 Nev. 37, 138 Pac. 914, a very similar amendment to their Constitution providing for the initiative and referendum, and which concluded with, "the provisions of this section shall be self-executing, but legislation may be especially enacted to facilitate its operation," borrowed from the Oregon Constitution, was nevertheless held not to be self-executing because of other provisions incorporated therein tending to negative the express declaration that the same was self-executing, and to signify that further legislation was intended to be required to make it operative.

And it would seem improbable that the legislature in submitting, and the people in adopting, this constitutional provision, intended it to be more than a direction to subsequent legislatures to provide, within the limitations therein declared, legislation providing procedure for constitutional amendment by initiative petition. This proposition of capital removal is illustrative in this, that a petition purporting to contain the names of thirty thousand electors of this state has been filed with the respondent, and upon that alone it is insisted that he must

submit to the people the proposition of capital removal through the indirect means of amendment of the Constitution. There are no requirements as to verification of such a petition if this constitutional provision is self-executing. Only the signatures of 25 per cent of the electors in half the counties in the state, or, in other words, the approval of one-eighth of the electorate of the state, is all that is necessary if respondent be correct. While a corresponding removal of a county seat can only be brought about by a petition "verified by the affidavit of each of the signers thereof, stating that he is a resident of the county, a qualified elector therein, and that he personally signed his name thereto, knowing the contents and purposes of the petition" for removal; § 3233, Comp. Laws 1913, and that too by a petition of at least three fifths of the voters according to the votes cast at the last preceding general election, with the manner of submission upon the ballot specifically provided. It is hard to believe that either the legislature or the people would understandingly adopt this constitutional provision unless it was merely as a general rule authorizing legislation. While results of concrete application are not controlling, they may be looked to when the statute or constitutional provision is ambiguous, and where adopted with such a history as here.

We have no desire to thwart the public will or prevent a state-wide election upon any question, unless plainly required to do so. But we are convinced that this provision is not self-executing, and the supreme court of Indiana in *Ellingham v. Dye*, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, at p. 227, has well expressed the frame of mind in which we find ourselves, in the following language: "Where the question presented to a court is a judicial question, it would be sheer, inexcusable cowardice and a violation of duty for it to decline the exercise of its jurisdiction," and to decline to interfere and restrain the submission of this question when it is proposed to do so without any sanction of law. There is no law under which this petition is tendered and filed or under which it can exist in a legal sense as a petition.

The writ prayed for will issue, restraining further proceedings by the respondent in the submission to vote of the matter in question. It is so ordered.

BURKE, J. (concurring). This case has received the most careful

consideration by every member of the court, and my associates have covered the different legal phases so fully that I can add little to what they have written. It has been generally conceded that the amendment in question was not intended to be self-executing. The main controversy has been upon the right of this court to make a declaration to that effect at this time. The argument that appeals to me is this: If there is no law authorizing an election at this time, is it not the duty of this court to make the announcement at once and thus save the costs of the campaign, rather than wait until the election is over and then notify the persons interested that their labors have been in vain? Why should New Rockford be put to the expense of the canvass of the state, if this court knows now that there is no possible chance of a legal election? I concur in the main opinion.

BRUCE, J. (concurring). I concur in the opinion of Mr. Justice Goss. It, to my mind, clearly expresses the intention of the people who voted for and adopted the constitutional provision which is before us.

What the people desired was that they might be enabled of their own initiative to propose constitutional amendments and to have them submitted to the electorate. They wished to avoid the necessity of a prior submission to the legislature, but they never intimated or intended that the right should be unlimited. They expressly provided that a petition signed by at least 25 per cent of the voters should be a prerequisite to the right. They never intended or intimated that any kind of a petition should be sufficient, and whether containing the requisite number of names or not, or whether containing forged names or not, and that there could be no redress as against an election which might be ordered under such a petition until after thousands of dollars had been expended in the useless ceremony of voting for that which at no time could become operative as law. The defendants and respondents do not deny that a sufficient petition must be filed before the election can be legally held and the constitutional amendment adopted. They merely contend that such matters cannot now be inquired into, that the discretion of the secretary of state is at present all controlling, and that it is absolutely immaterial what may be the nature of the petitions and whether every name is forged or not. They admit that

the election, if held, would be a nullity, that is to say if the petitions are in fact insufficient, but they insist upon the right to an election.

One would think, indeed, from this argument that idle voting was the chief industry of the state; that it was our only means of prosperity and of crop production, and that the lead pencil in the election booth was of more importance than crops and homes and schools and state stability and self-respect. Counsel, indeed, seem to appear to believe that we must fritter away our resources like wanton savages; that we must act as children, and for the sake of some alleged theory of popular sovereignty play at holding elections.

The argument of counsel also goes far in the other direction. Its theory, if adopted, would deal a crushing blow to the modern democratic movement which seeks to make the amendment of the Constitution always possible to a majority of the voters and a matter of easy accomplishment. *It puts it into the hands of one officer to decide whether that Constitution shall be amended or not.*

If, indeed, this court, as counsel contends (that is to say the taxpayers and voters, for the court merely acts for the taxpayers and voters), cannot prevent the secretary of state from ordering an election under bogus and forged petitions; if indeed such taxpayer cannot enjoy the privilege of having these petitions scrutinized and examined in the first instance; and if in such matters the secretary of state is supreme,—then he is supreme in all other matters, and in cases where the petitions are unquestionably regular and bona fide. According to the argument, indeed, even in cases where the petitions are regular and bona fide and the people really want an election under them, and are legally entitled to such an election, the secretary of state can refuse to order one merely because he does not personally desire it to be held. If he refuses, according to the logic of counsel, the courts cannot interfere, the taxpayers cannot interfere, and he himself is the autocrat of the Constitution.

The people who adopted the constitutional provision which is before us surely intended no such thing. They were not in the business of "making kings to rule over them." What they were after was a government by law and not a government by men, much less a government by one man.

CHRISTIANSON, J. (concurring). I concur in the opinion prepared

by Mr. Justice Goss. I would stop here, but for the question of jurisdiction raised by the respondent. This question, however, is of such tremendous importance and the determination thereof so vital that it seems impossible to give too much consideration thereto, and I therefore desire to add certain reasons, other than those advanced by my brother Goss, in support of the conclusions reached by him.

The questions presented for determination in this case arise under the recent amendment to the state Constitution providing for the proposal of constitutional amendments by a specified number of voters, by petition, *i. e.*, amendment of the Constitution by the method known as the initiative.

Under the Constitution as it existed prior to the adoption of the amendment under consideration, an amendment to the Constitution might be proposed in either house of the legislative assembly; and if the same was agreed to by a majority of the members elected to each of the two houses, the proposed amendment was entered on the journal of the house with the yeas and nays taken thereon, and referred to the legislative assembly chosen at the next general election, and if a majority of all the members elected to each house in the next legislative assembly so chosen agreed to the proposed amendment, it was then submitted to the people for ratification or rejection. Const. § 202.

The twelfth legislative assembly (1911 session) passed four bills proposing constitutional amendments providing for the proposal of statutes, or constitutional amendments, or both, by initiative petition. Senate bill No. 84, introduced by Senator Plain (Sess. Laws 1911, chap. 86), embraced both constitutional amendments and statutes. This bill expressly provided: "The secretary of state and all other officers shall be guided by the general laws and this act in filing and submitting initiative and referendum petitions until legislation shall be especially enacted therefor. This amendment shall be self-executing, but laws may be enacted for the purpose of facilitating its operation." House bill No. 237, introduced by Representatives Doyle of Foster county, and Ployhar of Barnes county (Sess. Laws 1911, chap. 94), provided for the proposal of laws, resolutions, and constitutional amendments, and the recall of officers. This bill contained full and explicit provisions for putting the same into action, and contained this proviso: "This amendment shall be self-executing, but legislation may be enacted especially to fa-

cilitate its operation." Under the provisions of both the Plain bill and the Doyle-Ployer bill, initiative petitions proposing constitutional amendments required the signatures of only 15 per cent of the legal voters in each county of at least one half of the counties of the state.

Senate bill No. 5 (Sess. Laws 1911, chap. 93), introduced by Senator Bessesen of Wells county, provided for the initiative and referendum of statutes, and had no application to constitutional amendments. This bill contained explicit directions, and provided adequate machinery, for putting the same into operation; and further, in express terms, provided: "This amendment shall be self-executing, but legislation may be enacted to facilitate its operation."

The amendment which is involved in this controversy was introduced as Senate bill No. 153 (Sess. Laws 1911, chap. 89), by Senator Gibbens of Towner county. This bill related to initiation of constitutional amendments only, and had no reference to the initiation of statutes. It provided that "any amendment or amendments to this Constitution may also be proposed by the people by the filing with the secretary of state, at least six months previous to a general election, of an initiative petition *containing the signatures of at least 25 per cent of the legal voters in each of not less than one half of the counties of the state.* When such petition has been properly filed *the proposed amendment or amendments shall be published as the legislature may provide for three months previous to the general election,* and shall be placed upon the ballot to be voted upon by the people at the next general election. Should any such amendment or amendments proposed by initiative petition and submitted to the people receive a majority of all the legal votes cast at such general election, such amendment or amendments shall be referred to the next legislative assembly, and should such proposed amendment or amendments be agreed upon by a majority of all the members elected to each house, such amendment or amendments shall become a part of the Constitution of this state. Should any amendment or amendments proposed by initiative petition and receiving a majority of all the votes cast at the general election as herein provided, but failing to receive approval by the following legislative assembly to which it has been referred, such amendment or amendments shall again be submitted to the people at the next general election for their approval or rejection as at the previous general election. Should such amendment or amendments receive a

majority of all the legal votes cast at such succeeding general election, such amendment or amendments at once become a part of the Constitution of this state. Any amendment or amendments proposed by initiative petition and failing of adoption as herein provided, shall not be again considered until the expiration of six years."

It will be noted therefore that the twelfth legislative assembly passed, and referred to the thirteenth legislative assembly, three different measures, relating in whole or in part to, and providing for the proposal of, constitutional amendments by initiative petition: The Plain and the Doyle-Ployhar bills in express terms providing that the proposed amendments were to be self-executing, and permitting constitutional amendments to be initiated by petitions signed by 15 per cent of the legal voters of one half of the counties of the state; and the Gibbens bill, which contained no provision, in express terms, declaring the proposed amendment to be self-executing; and which required initiative petitions to be signed by at least 25 per cent of the legal voters in not less than one half of the counties in the state.

These several measures were again introduced in the thirteenth legislative assembly (1913 session). The Plain bill was introduced by Senator Plain on January 29, 1913, as Senate bill No. 153 (See Senate Journal, p. 210), and when placed on its third reading and final passage on March 3, 1913, was defeated by a vote of 23 ayes to 25 nays, two senators being absent and not voting. Senate Journal, p. 1041.

The Doyle-Ployhar bill was introduced in the house of representatives on January 22, 1913, as house bill No. 133, by Representatives Ployhar of Barnes county and Blakemore of Cass county (House Journal, p. 317), and was passed by the house of representatives, on February 6, 1913 (House Journal, p. 537). It was made a special order in the senate for March 6, 1913, and passed by a vote of 26 ayes to 23 nays, one being absent and not voting. A motion to reconsider the vote, by which the bill was passed, and that the motion to reconsider be laid on the table, resulted in a tie vote, 24 ayes to 24 nays, two being absent and not voting, and the motion was defeated by the vote of Lieutenant Governor Kraabel, who voted against it. Senate Journal, p. 1347. A motion to reconsider the vote by which the bill was passed was thereupon adopted by a vote of 25 ayes to 24 nays, one being absent and not voting (Senate Journal, p. 1400), and the bill, being placed upon its

third reading and final passage, as defeated by a vote of 24 affirmative to 25 negative votes, one absent and not voting. Senate Journal, p. 1404.

The Bessesen bill was introduced in the senate on January 14, 1913, as senate bill No. 32, (Sess. Laws 1913, chap. 101), by Senator Overson of Williams county (Senate Journal, p. 51). It was passed by the senate on March 3, 1913 (Senate Journal, p. 1076). On March 7, 1913 (the last day of the legislative session), it, together with the Gibbens bill, was referred to a conference committee, and finally passed by both the house and the senate. Senate Journal, 1076, 1576, 1602, 1619; House Journal, 2005, 2066.

The Gibbens bill was introduced by Senator Gibbens as senate bill No. 73 (Sess. Laws 1911, chap. 98), on January 18, 1913. (Senate Journal, p. 98.) It was received in the house on the same day, and afterwards passed with certain amendments, in which the senate refused to concur. On March 7, 1913 (the last day of the session), as already stated, it, together with the Bessesen bill, was referred to a conference committee, and finally passed by both the house and the senate. Senate Journal, 1078, 1586, 1596, 1602, 1619; House Journal, 2006, 2064.

Certain petitions have been filed with the secretary of state proposing that § 215 of the Constitution be amended so as to remove the seat of state government from the city of Bismarck to the city of New Rockford. The relator, who is a qualified elector and taxpayer of the state of North Dakota, has invoked the original jurisdiction of this court, and filed his verified petition asking that a prerogative writ be issued enjoining the secretary of state from submitting the proposed amendment to the voters at the next general election. The relator, among other things, asserts: (1) That the constitutional amendment providing for the proposal of constitutional amendments by initiative petition is not self-executing; that the legislature has provided no machinery for putting the same into action, and that consequently there is no law under which the secretary of state may receive the petitions or submit the proposed constitutional amendment to the voters. (2) That the petitions are insufficient in substance and form; that there is not a sufficient number of names attached to the petitions; that a great number of the alleged names signed thereto are spurious and fictitious, and that a majority of the signatures was obtained by fraud, misrepresentation, and deceit.

The respondent has filed a motion to dismiss the proceedings, and also a demurrer to the petition, asserting that the court has no jurisdiction over the respondent and no power to interfere with his action with respect to the submission of the proposed amendment to the voters, for the reason that the respondent, while performing such acts, is a part of the legislative department of the state of North Dakota.

Logically, the first, and by far the most important, question to be determined is the question of jurisdiction. The answer to this, as well as the other questions raised, must be found in our state Constitution, and, if possible, in the constitutional provision under consideration. Does this provision manifest an intent on the part of its framers, and the people who adopted it, to invest the secretary of state with power to pass upon and determine all questions (including the question of whether the provision is in fact self-executing)? If so, then unquestionably the objections to the jurisdiction are well taken. That the people had the right to vest such power in the secretary of state cannot be questioned (at least not by a proceeding in the courts), because our government is constructed on the principle that the right to institute or alter government and distribute the governmental powers in such manner "as to them shall seem most likely to effect their safety and happiness" is a function inherent in the great body of the people.

In all forms of peaceful and orderly government there must be rules of conduct, *i. e.*, laws. These rules must be formulated, interpreted, and enforced. The functions of government, therefore, naturally divide themselves into three parts,—the making of laws, the interpretation of laws, and the enforcement of laws. In absolute monarchies, these governmental powers were, and are, all combined in, and exercised by, the sovereign king. When the founders of our government instituted the new government and organized its powers, they firmly believed that "there can be no liberty where the legislative and executive powers are united in the same person or body of magistracy; or if the power of judging be not separated from the legislative and executive powers." And in order to safeguard the rights and liberties of the people, they created three separate co-ordinate departments or branches of government: The legislative, the executive, and the judicial. This distribution of governmental powers, so far as practicable, is the fundamental idea in the creation of all our Constitutions, both Federal and state.

This division of governmental power was adopted by the framers of our state Constitution, the legislative power being vested in the legislature, the executive power in the governor, and the judicial power in the courts. Const. §§ 25, 71, 85.

The legislative department has the authority to make, alter, and repeal, the executive department to administer and enforce, and the judicial department to interpret and apply, laws. It is the duty of the legislature to declare what the law shall be, and the duty of the courts to declare what the law is. The judicial department was created for the purpose of, and vested with the power to, apply and construe the Constitution and laws. It is vested with authority to hear and determine when the rights of persons or property, or the propriety of doing an act, is the subject matter of adjudication, and to adjudicate and determine such rights and controversies by appropriate decrees. See 4 Words & Phrases, p. 3860; 2 Words & Phrases, 2d Series, p. 1266.

The state Constitution guarantees that "all courts shall be open, and every man . . . shall have remedy by due process of law, and right and justice administered without sale, denial or delay." Const. § 22. It has reserved to the supreme court original jurisdiction to issue remedial writs, and hear and determine controversies involving questions *publici juris*, and affecting the sovereignty of the state, or its franchises or prerogatives, or the liberties of the people. Const. § 87.

The secretary of state is not a judicial officer or invested with judicial power. State ex rel. Standard Oil Co. v. Blaisdell, 22 N. D. 86, 132 N. W. 769, Ann. Cas. 1913E, 1089. He is an officer of the executive department. And while this office was created by the Constitution as a part of the executive department, the powers and duties thereof were not prescribed by the Constitution, but left for legislative action. Const. § 83. In accordance with the constitutional direction, the legislature proscribed the duties of the secretary of state. Among the duties so proscribed were some relating to elections. The secretary of state was required to receive and file certificates of, and petitions for, nominations for state and district officers, and certify such nominations to the several county auditors of the state. He was also required to perform certain duties with respect to the publication of proposed constitutional amendments. The extent of the power and authority conferred upon the secretary of state with respect to these matters has been frequently

considered by this court, and was well settled at the time the constitutional amendment under consideration was adopted.

In *State ex rel. Wineman v. Dahl*, 6 N. D. 81, 34 L.R.A. 97, 68 N. W. 418, this court granted a peremptory writ of mandamus, commanding the secretary of state to certify to the auditors of the various counties of the state a joint resolution passed by the legislature providing for the calling of a constitutional convention.

In *State ex rel. Plain v. Falley*, 8 N. D. 90, 76 N. W. 996, application was made for, and this court issued, a peremptory writ of mandamus commanding the secretary of state to certify the legislative nominees of the "Independent and Democratic Party" to the county auditor of Cavalier county. The relators in that case claimed that there had been a fusion of the "Independent" and "Democratic" parties, and that they were the nominees of a joint convention of such parties. The secretary of state, by answer, denied such fusion, and asserted that the "Independent and Democratic Party" had no legal existence or standing as a party under the laws of this state. In disposing of these questions this court said: "*Relators contend that none of these questions are before us; that the duties of the secretary of state, in certifying nominations to county auditors, are ministerial purely; and that, if the certificates filed with him are fair on their face, he is without authority to look beyond or outside of the certificates. In this we think relators are clearly right, and a few observations touching the statutes and their construction will disclose our reasons for thus holding. We remark, first, that, if the secretary be clothed with judicial functions to pass upon the legality of all nominations the certificates of which are filed with him, his determinations would be final, as certainly no provisions for appeal or review can be found in the statute, and the decisions of a special tribunal charged with the duty of deciding a special matter are always final, unless the right of appeal be expressly given. 2 Enc. Pl. & Pr. 22. Further, if the secretary be clothed with judicial functions in this matter, then the political policy of the state may often turn upon his decision. The power is great, and its exercise by an officer universally recognized as political in character would be dangerous, however able and however honest the incumbent might be. For these reasons we should expect to find the power, if conferred at all, conferred in no uncertain terms. And yet confessedly there is no express judicial*

authority conferred upon the secretary by the statute. At most, it is an implied authority, and, *if implied, the means and instrumentalities for its proper exercise are entirely wanting. He can conduct no formal judicial inquiry. He cannot coerce the production of persons or papers. He cannot enforce testimony under the sanction of an oath. His most earnest effort would with equal facility elucidate or suppress the truth. To imply authority under such conditions, the implication must be practically impossible of evasion.* . . .

"We do not agree with counsel for the relators that no power rests anywhere to prevent the certification to the county auditors of nominations not made in some one of the ways pointed out by statute. If no such power exist, then it was utterly useless to provide in what manner nominations should be made, for, however made, they must be certified down. . . . The certificates filed with the secretary must be kept open to public inspection. There is a purpose in that provision. The secretary is a disinterested party. He has no duty to perform touching such nominations, except to certify them to the proper auditor. That duty every citizen is bound to presume he will perform. But, if improper nominations have been filed, *any citizen interested may apply to a court of competent jurisdiction, where all the facts can be speedily and certainly investigated, and, if nominations other than as prescribed by statute have been filed with the secretary, that officer may be enjoined from certifying the same to the county auditors.* But if no such restraining order be served, it is the duty of the secretary to certify all nominations proper certificates of which have been filed in his office. The law does not allow him to concern himself whether such nominations were or were not properly made, and when he, of his own volition, refuses to certify such nominations, and parties in interest bring proceedings to enforce the performance of such duty, it is no answer upon his part to say that facts exist which would have enabled the proper party, at the proper time and in the proper manner, to procure an order restraining him from certifying such nominations. No such order having been in fact obtained, the existence of the facts did not release his duty."

In *State ex rel. Cooper v. Blaisdell*, 17 N. D. 575, 118 N. W. 225, this court held that "in the performance of his duties as secretary of state, in certifying the names of candidates for state offices to the different county auditors for printing upon the ballot to be used at the general

election, *the secretary acts in a ministerial capacity*," and issued a writ of mandamus, compelling the secretary of state to certify to the several county auditors of the state the names of certain persons nominated by petition as candidates of the Socialist party.

In State ex rel. McCue v. Blaisdell, 18 N. D. 55, 24 L.R.A. (N.S.) 465, 138 Am. St. Rep. 741, 118 N. W. 141, this court assumed and sustained its original jurisdiction of a proceeding instituted by an elector, who asked for the issuance of a prerogative writ enjoining the secretary of state from certifying the names of certain persons as candidates for the office of United States Senator.

In State ex rel. Miller v. Blaisdell, 34 N. D. 321, 159 N. W. 401, this court upon the application of Thomas F. Marshall, enjoined the secretary of state from certifying the name of Edward Engerud as a candidate for the office of United States Senator, for the reason that the nominating petition did not specify whether said Engerud was a candidate for the term of office which expired on March 3, 1915, or for the term which expires on March 3, 1917.

In State ex rel. Dorval v. Hamilton, 20 N. D. 592, 129 N. W. 916, this court held the provision in the primary election law to the effect that no nomination shall be made unless the vote cast for state, district, or county offices, is at least 30 per cent of the total number of votes cast for secretary of state of each political party at the last general election, to be unconstitutional and void, and directed the district court to issue a writ of mandamus commanding the county auditor of Cavalier county to place the name of the Democratic nominee for the office of county judge upon the official ballot.

In State ex rel. Williams v. Meyer, 20 N. D. 628, 127 N. W. 834, this court entertained jurisdiction and issued an original writ of mandamus directing that the name of the relator be printed upon the Republican ballot for use at the primary election of 1911, as a candidate for state senator. The questions presented and determined in that case involved a construction of certain constitutional provisions relative to the length of terms of state senators. The question was raised that under the Constitution the state senate was the judge of the election and qualification of its own members, and that consequently the decision of a court on this question would be of no force or effect. In disposing of the question, this court said: "This court does not attempt to say what mem-

bers shall be seated. It is simply passing upon the question of law presented with a view to determining whether the action of the county auditor is legal in refusing to file relator's petition and to print his name as a candidate for senator upon the primary election ballot. It is unnecessary for us to consider whether our decision may have any effect upon the action of the senate in the premises should a new senator be elected, and both he and the old senator claim seats in the . . . legislature. The question of the power of the courts to direct the action of the auditor in such cases has been so often passed upon that we deem it unnecessary to discuss it."

In *State ex rel. Watkins v. Norton*, 21 N. D. 473, 131 N. W. 257, this court issued a writ of mandamus commanding the secretary of state to publish, as required by law, a certain act passed by the twelfth legislative assembly.

In *State ex rel. Standard Oil Co. v. Blaisdell*, 22 N. D. 86, 132 N. W. 769, Ann. Cas. 1913E, 1089, this court held that the secretary of state was not a judicial officer, under the Constitution, and that judicial power could not be vested in him.

It will be observed that in many of the several decisions above referred to, the court either commanded the secretary of state to submit some proposed question, or the candidacy of some person, to the electorate, or enjoined him from so doing. These several decisions were promulgated prior (many of them long prior) to the adoption of the constitutional amendment under consideration, and they firmly established the principle that the secretary of state was not a judicial, but an administrative, officer; that he was invested with no power to pass upon or determine the merits of any controversy arising under the election laws with respect to the submission of candidacies or propositions to the electorate; but that his duties relating thereto were purely ministerial. If he failed to perform a duty imposed by the statute, mandamus would issue to compel action; if he sought to act when, or in a manner, not authorized, injunction would issue to restrain him from acting. The policy of the state as declared in the Constitution and statutes, as well as by the decisions of this court, had been consistently adhered to for a quarter of a century before the adoption of the constitutional amendment under consideration. It is now asserted by respondent that this governmental policy has been abandoned; that the constitutional provision under con-

sideration manifests an intent to transform the secretary of state from a ministerial into a legislative officer, and to invest him, in that capacity, with power to pass upon and determine the different questions which may arise with respect to the proposal and submission of constitutional amendments by initiative petition. If the constitutional provision manifests such intent, it is our duty to so declare, and our labors and our duty ends there; but if no such intent is manifested then it is equally our sworn duty to so declare and proceed to a determination of the other questions presented.

Our Constitution provides its own rule of construction. It says: *"The provisions of this Constitution are mandatory and prohibitory unless, by express words, they are declared to be otherwise."*

Let us examine the constitutional provision under consideration and see what, if anything, it said therein to indicate any intent to depart from the former governmental policy or to confer the asserted power upon the secretary of state. The only reference made to the secretary of state in the provision is in the first sentence, which provides that initiative petitions shall be filed with him. Is this indicative of any intent to depart from the former policy or invest him with the powers contended for? Clearly not. He is the logical custodian of such petitions, and has been recognized as such throughout the entire history of the state. He is, and has been, the officer with whom nominating petitions for state officers, under the primary and general election laws, must be filed. There is no requirement that the other duties incident to the operation of this amendment, such as the publication of the proposed amendments, shall be performed by the secretary of state. These matters are left for legislative action, and may doubtless be imposed by the legislature upon such administrative officer or officers as their judgment may approve. The constitutional provision provides in no uncertain terms:

(1) That initiative petitions proposing constitutional amendments must be filed at least six months previous to a general election, and *that such petitions must contain the signatures of at least 25 per cent of the legal voters in each of not less than one half of the counties of the state.*

(2) That *"when such petition has been properly filed, the proposed amendment or amendments shall be published as the legislature may provide for three months previous to the general election."*

(3) That an amendment or amendments proposed by initiative petition and failing of adoption shall not be again considered until the expiration of six years. One thing is self-evident, either the secretary of state has authority to determine the sufficiency of initiative petitions or he has not. If the secretary is invested with the power asserted and the courts shorn of power to interfere, then the secretary of state may, if he desires, submit proposed constitutional amendments regardless of the sufficiency of the petition or the number or qualifications of the petitioners, or he may refuse to submit such question, even though the petition is clearly sufficient. The courts either have power to interfere or they have not. From this there is no escape. Is there anything said which indicates an intent to invest the secretary of state with any discretion, or confer upon him any greater or different powers with respect to initiative petitions, than those possessed and exercised by him with respect to nominating petitions filed with him under the election laws? I think not. It seems to me that the language contained in the constitutional provision negatives, rather than implies, any intent to confer discretionary or determinative powers upon the secretary of state. The directions and conditions prescribed are given in positive terms. The plain and unmistakable intent manifested by the language of the provision is that a constitutional amendment cannot be proposed by initiative petition unless such petition is signed by the prescribed number of *legal voters*. But "when such petition has been properly filed, the proposed amendment *shall be published*," and "*shall be placed upon the ballot*." And if an amendment proposed is rejected at the polls it cannot again be submitted until the expiration of six years. In my opinion the intent manifested by this provision is clearly to confer upon the secretary of state only the same powers which he possessed with respect to nominating petitions filed under the election laws, and his duties are ministerial only; and he can be compelled to act when it is his duty to do so or restrained from acting when he seeks to act at a time or in a manner not authorized.

The people in their Constitution have said that the judicial power in this state, *i. e.*, the power to interpret and apply laws, shall be vested in the courts. And in their Constitution they have created and designated the courts authorized to perform these functions. Yet if respondent is correct in his contention, the power to interpret and apply the

constitutional provision under consideration and determine all questions arising thereunder, including the legal sufficiency of initiative petitions and the qualifications of the signers thereto, is vested, not in the courts, but in the secretary of state, who is not a judicial, but a political, officer. Obviously the interpretation and application of this constitutional provision, and the determination of the various questions likely to arise thereunder, would require exercise of the very highest degree of judicial skill and judgment. It is difficult to conceive of any legal questions of more profound importance to the people of the state. And if it was intended to confer such power upon the secretary of state, we should expect to find the power conferred in positive and unequivocal terms. Yet it is conceded that such power, if conferred at all, is conferred by implication only. Certain language used by this court in *State ex rel. Plain v. Falley*, 8 N. D. 90, 76 N. W. 996, seems directly applicable: "If the secretary be clothed with judicial functions in this matter, then the political policy of the state may often turn upon his decision. The power is great, and its exercise by an officer universally recognized as political in character would be dangerous, however able and however honest the incumbent might be. For these reasons *we should expect to find the power, if conferred at all, conferred in no uncertain terms. And yet confessedly there is no express judicial authority conferred upon the secretary*" by the constitutional amendment. And if the power be deemed implied, "*the means and instrumentalities for its proper exercise are entirely wanting. He can conduct no formal judicial inquiry. He cannot coerce the production of persons or papers. He cannot enforce testimony under the sanction of an oath. His most earnest effort would with equal facility elucidate or suppress the truth. To imply authority under such conditions, the implication must be practically impossible of evasion. But so far is [the constitutional provision] our statute from giving such implied authority that, in our view, it expressly withholds such authority.*"

Respondent suggests, however, that the various questions now presented might eventually be determined by the courts, but that the people should first have an opportunity to reject the proposition, and if they reject it then no question would remain for determination. Again the language and reasoning of Chief Justice Bartholomew in *State ex rel. Plain v. Falley*, *supra*, is applicable. If the secretary be clothed with

authority to pass upon questions arising under said constitutional provision, "his determination would be final, as certainly no provisions for appeal or review can be found" therein.

It seems to me that respondent's contention is unsound for another reason. Respondent asserts his right to act under a certain constitutional amendment. If this constitutional amendment (as relator asserts) is not self-executing, then obviously there is no provision of law under which the petitioners could propose, or the respondent submit, constitutional amendments. They would stand precisely in the same position as though this constitutional provision did not exist, because a constitutional provision which is not self-executing is merely addressed to the legislature granting to or imposing upon it, constitutional authority to enact suitable legislation to carry it into effect. *State ex rel. Ohlquist v. Swan*, 1 N. D. 5, 44 N. W. 492; *Doherty v. Ransom County*, 5 N. D. 1, 63 N. W. 148; *Engstad v. Grand Forks County*, 10 N. D. 54, 84 N. W. 577.

As I have already stated, the sovereignty of the people, and their right to alter or reform the existing government, lie at the very foundation of our governmental existence. In fact this right is expressly reserved in our state Constitution. Const. § 2. It has been said that a self-evident corollary to the right so reserved is "that an existing lawful government of the people cannot be altered or abolished unless by the consent of the same people, and this consent must be legally gathered or obtained." For, "by the Constitution which they [the people] establish, they not only tie up the hands of their official agencies, but their own hands as well; and neither the officers of the state, nor the whole people as an aggregate body, are at liberty to take action in opposition to this fundamental law." Cooley, Const. Lim. 7th ed. p. 56.

And "an attempt by the majority to change the fundamental law in violation of the self-imposed restrictions is unconstitutional and revolutionary. Although the vote of the people may be overwhelming in adopting a Constitution formulated by a convention not legally called, it would be the duty of the executive and judiciary and all officers sworn to support the old Constitution to resist to the utmost the installation of government under the new revolutionary Constitution. If overpowered, the new government would be established, not by peaceful means, but by actual revolution. The unauthorized action of a con-

vention cannot be ratified by the electorate, since those voting at an unauthorized election have no power to represent or to bind those who do not choose to vote." 6 R. C. L. p. 26.

In this state the people have agreed that constitutional amendments may be proposed by initiative petition signed by at least 25 per cent of not less than one half of the counties of the state. Obviously an attempt to submit a proposition upon petitions signed by a lesser number would not be a compliance with the constitutional provision. It is only by means of a petition signed by the number of signers prescribed by this provision that "an authorized consent of the whole people, the entire state, can be lawfully obtained in a state of peace. Irregular action, whereby a certain number of the people assume to act for the whole, is evidently revolutionary. The people, that entire body called the state, can be bound as a whole only by an act of authority proceeding from themselves. In a state of peaceful government they have conferred this authority upon a part to speak for the whole only at an election authorized by law. It is only when an election is authorized by law, the electors, who represent the state or whole people, are bound to attend, and if they do not, can be bound by the expression of the will of those who do attend. The electors who can pronounce the voice of the people are those alone who possess the qualifications sanctioned by the people in order to represent them, otherwise they speak for themselves only, and do not represent the people." *Wells v. Bain*, 75 Pa. 39, 15 Am. Rep. 571.

And "it is the duty of the courts to enforce the provisions of an existing Constitution in reference to matters connected with proposed changes in the Constitution as in other cases, and therefore they may be called on to compel the proper state officials to accept petitions filed under the initiative and referendum law for the purpose of proposing amendments, or to publish a proposed constitutional amendment as required by the Constitution, or to compel the making of a proclamation that a certain amendment has been adopted, or to compel the submission of duly proposed amendments, or to restrain the improper submission of amendments." 6 R. C. L. 32.

The second question presented is whether the constitutional provision is self-executing. Again we are required to ascertain the intent of the framers and of the people who adopted it. For "the question in such

cases is always one of intention, and to determine the intent, the general rule is that courts will consider the language used, the objects to be accomplished by the provision, and the surrounding circumstances, and to determine these questions from which the intention is to be gathered, the court will resort to intrinsic matters when this is necessary." 8 Cyc. 754. And, "it is settled by very high authority that in placing a construction on a Constitution, or any clause or part thereof, a court should look to the history of the times, and examine the state of things existing when the Constitution [or the provision] was framed and adopted." 6 R. C. L. 51.

It is not the function of a Constitution to serve as a Code. "Its purpose is to prescribe the permanent frame work of the system of government and assign to the different departments their respective powers and duties, and to establish certain fixed principles on which government is founded."

A self-executing constitutional provision is said to be "one which supplies the rule or means by which the right given may be enforced or protected or by which a duty may be performed." 8 Cyc. 753. It is a provision which is complete in itself and needs no further legislation to put it into force. *Davis v. Burke*, 179 U. S. 399, 45 L. ed. 249, 21 Sup. Ct. Rep. 210. But a constitutional provision which merely indicates "a line of policy or principles, without supplying the means by which such policy or principles are to be carried into effect," is not self-executing "and will remain inoperative until rendered effective by supplemental legislation." 8 Cyc. 759.

Some of the provisions of our state Constitution are self-executing, others are not. Thus our state Constitution contains the following provision: "No person, association or corporation shall within this state, manufacture for sale or gift, any intoxicating liquors, and no person, association or corporation shall import any of the same for sale or gift, or keep or sell or offer the same for sale, or gift, barter or trade as a beverage. The legislative assembly shall by law prescribe regulations for the enforcement of the provisions of this article and shall thereby provide suitable penalties for the violation thereof." Const. § 217.

In the early case of *State ex rel. Ohlquist v. Swan*, 1 N. D. 5, 44 N. W. 492, it was asserted that this provision was a self-executing enactment, and as such repealed the prior license law. This court, however,

held that it was not self-executing, and that, until supplemental legislation was enacted to carry the same into effect, it was only a declaration of principles and without force to repeal the prior license law.

In *Engstad v. Grand Forks County*, 10 N. D. 54, 84 N. W. 577, this court considered that part of § 176 of the Constitution reading as follows: "and the legislative assembly shall by a general law exempt from taxation property used exclusively for school, religious, cemetery or charitable purposes." This provision was held to be not self-executing. The court said: "The Constitution does not, in the clause we have quoted, purport to exempt any property from taxation. On the contrary, the clause under consideration lays a command upon the legislative assembly, and requires that body, by general law, to exempt certain property from taxation, among which is property used exclusively for charitable purposes. This clause, therefore, is clearly not self-executing. Its very terms look forward to and require ulterior action upon the part of the lawmaking branch of the government."

The constitutional provision under consideration in the case at bar provides that: "the proposed amendment shall be published as the legislature *may provide* for three months previous to the general election." This language is prospective. "And constitutional provisions, like statutes, always operate prospectively, and not retrospectively, unless the words used or the objects to be accomplished clearly indicate that a retrospective operation is intended." 8 Cyc. 745. See also 6 R. C. L. 33; *Shreveport v. Cole*, 129 U. S. 36, 32 L. ed. 589, 9 Sup. Ct. Rep. 210.

The legislature has enacted no legislation providing for such publication. But the respondent contends that the laws in existence at the time the amendment was adopted should be applied, and that when this is done, legislative direction as to the publication of constitutional amendments proposed by initiative petitions has been given.

The laws upon which the respondent relies are §§ 3188 and 979, Compiled Laws 1913. These sections were originally enacted by the legislature in 1891. Section 3188 merely provides the manner of publication of a constitutional amendment after its adoption by the first legislature and before the selection of the members of the next legislature. Section 979, Comp. Laws 1913, reads: "Whenever a proposed constitutional amendment or other question is to be submitted to the people of

the state for popular vote the secretary of state shall, not less than thirty days before election, certify the same to the auditor of each county in the state and the auditor of each county shall include the same in the publication provided for in § 975. Questions to be submitted to the people of the county shall be advertised as provided for nominees for office in such section."

Section 975, referred to in § 979, requires that ten days before an election, notice thereof shall be given by the county auditor by publication in one or more newspapers within the county, or if there is no newspaper published, then by posting notices thereof at three public places in each precinct.

The laws to which respondent refers were passed with respect to the proposal of constitutional amendments by the legislature. The constitutional provision to which they relate reads: "Any amendment or amendments to this Constitution may be proposed in either house of the legislative assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment shall be entered on the journal of the house with the yeas and nays taken thereon, and referred to the legislative assembly to be chosen at the next general election, and shall be published, as provided by law, for three months previous to the time of making such choice, and if in the legislative assembly so next chosen as aforesaid such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislative assembly to submit such proposed amendment or amendments to the people in such manner and at such time as the legislative assembly shall provide.

. . ." Const. § 202. It will be noted that while this constitutional provision directs that a proposed constitutional amendment "shall be published, as provided by law, for three months previous" to the election at which the members of the legislative assembly to whom the proposed amendment has been referred are chosen it prescribes no length of time for the publication thereof prior to the time of its submission to the people for approval, but this is left solely for legislative determination. The legislature directed that such notice be published at least ten days previous to the election. On the other hand, the constitutional provision relating to publication of constitutional amendments proposed by initiative petition states in positive terms that such amendment

"shall be published as the legislature may provide for three months previous to the general election." The only authority given to the legislature (and it is given to the legislature, and not to the secretary of state) is to provide the manner of publication. The necessity of publication, as well as the minimum length of time during which publication must be made, is determined by the constitutional provision. The legislature is given no right, either to dispense with publication or permit publication for a lesser time than that prescribed, but such amendment must be published for a period of at least three months previous to the election. The requirement that a proposed amendment *"shall be published as the legislature may provide for three months previous to the general election"* is a command addressed to the legislature, and a limitation upon its authority with respect to such publication; *i. e.*, the framers of the constitutional provision and the people who adopted it said to the lawmaking body: "We authorize you to prescribe the mode and manner in which proposed amendments shall be published, and to designate a proper administrative officer, or officers, to cause such publication to be made, but you must in all events cause the same to be published for at least three months previous to the election."

There is a radical difference between the two methods of amending the Constitution. Where a constitutional amendment is proposed by the legislature, it is proposed by representatives of the people and is printed in the proceedings of the legislative assembly, as well as among the legislative acts of that body. This takes place over a year and a half before the next legislative assembly is chosen. The proposed constitutional amendment is then published as required by law for three months previous to the election at which the members of the next legislative assembly are chosen, in order that the people may have further notice before choosing the members of such assembly that the proposed amendment has been referred to and will, or may, be voted upon by the legislators so chosen. The proceedings with reference to the amendment will appear in the house and senate journal. And, if passed, the amendment is again printed in full among the acts of the legislative assembly. And the legislature has further provided that notice of its submission must be given by publication in each county in the state for at least ten days previous to the election at which it is submitted to the electors for adoption. An amendment proposed under this method remains pending

for a considerable length of time, and necessarily is afforded a great deal of publicity. But when an amendment is proposed by initiative petition, it emanates not from any chosen representatives of the people, but from those who prepare, circulate, or sign such petitions. Such amendment is not only submitted to the people at the following general election, but if adopted *ipso facto*, is referred to the legislative assembly chosen at that same election. In order that intelligent action may be taken by the voters, they must be informed in regard to the proposed amendment, and so it is provided that an amendment proposed by initiative petition "shall be published for three months previous to the general election." Under these circumstances, can it be said that the laws adopted by the legislature in 1891 providing for publication of constitutional amendments proposed by the legislature constitute an expression of the legislative intent as to the method and manner in which constitutional amendments proposed by initiative petition under a constitutional provision proposed in 1911, and adopted by the people in 1914, ought to be published? The answer seems obvious.

There are many things, not only in the language of the constitutional provision under consideration, but in the history of its enactment, which negative an intent to propose a self-executing provision. Many of these have been discussed by Mr. Justice Goss, and I shall not attempt to elaborate upon what he has said. It should be remembered, however, that it was the only act relative to the initiative and referendum considered by the twelfth and thirteenth legislative assemblies, which did not purport to be self-executing; that the act relating to the initiative and referendum of statutes provided the necessary machinery for its operation, and contained an express declaration to the effect that it was self-executing; that these two measures were not only passed by the same legislatures, but were referred to, considered and recommended for passage by, the same conference committee of the thirteenth legislative assembly. It is difficult to believe that the members of such conference committee and the members of the thirteenth legislative assembly deemed the proposal of statutes to be of more importance than the proposal of constitutional provisions. The language of the provision under consideration, as well as the history of its enactment, however, leads to the irresistible conclusion that its framers and the people who adopted it

intended that the right conferred should be exercised under such reasonable rules and regulations as the lawmaking body should prescribe.

The right of a small number of electors to propose new legislation or the referendum or repeal of laws enacted by the legislature is in itself a great power, and in order to prevent an abuse thereof, such as the presentation of fictitious or fraudulent petitions, certain safeguards are frequently, and generally, prescribed. Thus, in our sister state, South Dakota, petitioners (proposing initiative or referendum of statutes) are required to add to their signatures their places of residence, their occupation and post-office addresses, and it is made a crime punishable by a maximum penalty of imprisonment for five years in the state's penitentiary for any person to sign any name other than his own to such petition, or for a person not a qualified elector of the state to sign the same. The petitions are also required to be accompanied by the oath of every person who circulates the same, or secures signatures thereto. See Political Code, Comp. Laws 1913, pp. 8-10. While the initiation, suspension, or repeal of laws is a matter of great importance, the proposal of new, or change of existing, constitutional provisions, is of even greater importance. It involves an exercise of the highest functions of sovereignty. If the provision is not self-executing, it constitutes a declaration of principles or policy and authorized the enactment of laws to carry such principles or policy into effect. If the provision is self-executing, it not only declares a policy, but also puts the same into effect as a rule of conduct. In either case it may affect directly the life, liberty, and happiness of every inhabitant of the state.

The members of this court have given to this matter their most anxious thoughts and labor, and have arrived at the best conclusions honest convictions can reach. The intent of the framers and the people who adopted the constitutional provision seems too plain to admit of doubt. This being so, our duty, however unpleasant and embarrassing it may be, is equally plain. We must declare the fundamental law to be what it is. To do otherwise would be a breach of the duties we have sworn to discharge, and a violation of the Constitution we have sworn to support.

**FIRST NATIONAL BANK OF WESTHOPE, a Corporation, v.
J. M. MESSNER and P. S. Hilleboe (P. S. Hilleboe, Appel-
lant).**

(159 N. W. 92.)

**Bank — damages — action — vice president — securities — wrongful release —
interest due — answer — denials — jury — findings of — issues — evidence
— sufficiency of — verdict — directed.**

1. In an action by a bank to recover damages against its former vice president for the alleged wrongful release of certain securities claimed to be held by such bank, without first collecting interest due it, the answer denies that any such securities were held by the bank, and also denies that he wrongfully released any such alleged securities. The jury found both issues in plaintiff's favor. The sufficiency of the evidence to sustain these findings was challenged in the trial court, and is now challenged on this appeal.

Held, for reasons stated in the opinion, that the evidence is insufficient to sustain the latter finding, and that a verdict for appellant should have been directed.

Contract — interest — excess of legal rate — must be in writing.

2. A contract, not in writing, to pay interest in excess of the legal rate may be enforced for such legal rate only.

Opinion filed June 15, 1916. Rehearing denied September 8, 1916.

Appeal from District Court, Bottineau County, *A. G. Burr, J.*

From a judgment in plaintiff's favor and from an order denying defendant's motion for a new trial, defendant appeals.

Reversed and judgment directed to be entered for a dismissal of the action.

Cowan & Adamson and H. S. Blood, for appellant.

Interest for any legal indebtedness shall be at the rate of 7 per cent, unless a different rate is specified in writing. Comp. Laws 1913, §§ 5888, 6072, subdiv. 5.

In the absence of a written promise, the law fixes the rate of interest on all legal indebtedness. *Lowe v. Jensen*, 22 N. D. 148, 132 N. W. 661; 9 Cyc. 749, and cases there cited.

At the time the lands were conveyed by the bank, it had in its hands moneys belonging to the land company, more than enough to take up

plaintiff's claim, and at any time during this period the bank could have applied this deposit on the indebtedness. *Shuman v. Citizens' State Bank*, 27 N. D. 599, L.R.A.1915A, 728, 147 N. W. 388.

Bangs, Netcher, & Hamilton and Soule & Cooper, for respondent.

The evidence in this case is conflicting, but the verdict is supported by substantial evidence, and therefore must stand. *Lang v. Bailes*, 19 N. D. 587, 125 N. W. 891, and cases cited.

Where the jury finds a verdict for plaintiff, and the trial court refuses to set it aside, such a verdict will not be disturbed when it appears there is substantial conflict in the evidence. *F. A. Patrick & Co. v. Austin*, 20 N. D. 261, 127 N. W. 109; *Acton v. Fargo & M. Street R. Co.* 20 N. D. 434, 129 N. W. 225; *O'Chander v. Dakota County*, 90 Neb. 3, 132 N. W. 722.

Where the evidence is contradictory, and the determination of the question depends upon the credibility of the witnesses, the question is solely for the jury. Appellate courts do not weigh conflicting evidence. *McKnight v. Bell*, 168 Pa. 50, 31 Atl. 942; *Moulor v. American L. Ins. Co.* 101 U. S. 708, 25 L. ed. 1077; *Casey v. First Bank*, 20 N. D. 211, 126 N. W. 1011; *Libby v. Barry*, 15 N. D. 286, 107 N. W. 972; *Drinkall v. Movius State Bank*, 11 N. D. 10, 57 L.R.A. 341, 95 Am. St. Rep. 693, 88 N. W. 724; *State v. Foster*, 14 N. D. 561, 105 N. W. 938; *Anderson v. Medbery*, 16 S. D. 329, 92 N. W. 1087; *Pengilly v. J. I. Case Threshing Mach. Co.* 11 N. D. 249, 91 N. W. 63, 12 Am. Neg. Rep. 619; *Dewey v. Chicago & N. W. R. Co.* 31 Iowa, 373.

That the trial court has acted arbitrarily, oppressively, or in defiance of law must be affirmatively shown, or the order denying a new trial will not be disturbed, the presumption being that the evidence is sufficient to justify the verdict. *Pengilly v. J. I. Case Threshing Mach. Co.* 11 N. D. 249, 91 N. W. 63, 12 Am. Neg. Rep. 619; *Ross v. Robertson*, 12 N. D. 27, 94 N. W. 765; *State v. Howser*, 12 N. D. 495, 98 N. W. 352; *Galvin v. Tibbs*, 17 N. D. 600, 119 N. W. 39.

There must be a clear showing of abuse of discretion by the trial court, if there is evidence in the record fairly tending to support the verdict. *Bristol & S. Co. v. Skapple*, 17 N. D. 271, 115 N. W. 841; *State v. Denny*, 17 N. D. 519, 117 N. W. 869; *Libby v. Barry*, 15 N. D. 286, 107 N. W. 972; *Heyrock v. McKenzie*, 8 N. D. 601, 80 N. W. 762; *Stoakes v. Monroe*, 36 Cal. 388, 2 Mor. Min. Rep. 246; 14 Enc.

Pl. & Pr. 791; *State v. Albertson*, 20 N. D. 512, 128 N. W. 1122; *Finch v. Martin*, 13 S. D. 274, 83 N. W. 263; *Wheeler v. Castor*, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381; *Esshom v. Watertown Hotel Co.* 7 S. D. 74, 63 N. W. 229; *Distad v. Shanklin*, 11 S. D. 1, 75 N. W. 205; *Dinnie v. Johnson*, 8 N. D. 153, 77 N. W. 612; *Magnusson v. Linwell*, 9 N. D. 154, 82 N. W. 746; *Baker v. Baker*, 2 S. D. 261, 39 Am. St. Rep. 776, 49 N. W. 1064; *Irving v. Dockstader*, 12 S. D. 320, 81 N. W. 629; *Howland v. Ink*, 8 N. D. 63, 76 N. W. 992; *Flath v. Casselman*, 10 N. D. 420, 87 N. W. 988; *Weiss v. Evans*, 13 S. D. 185, 82 N. W. 388; *Witte v. Koeppen*, 11 S. D. 598, 74 Am. St. Rep. 826, 79 N. W. 831; *Bauder v. Schamber*, 7 S. D. 54, 63 N. W. 227.

The province of the appellate court in such appeals is only to determine whether there is evidence legally tending to prove the fact affirmed. *Vaughan v. Chicago Junction R. Co.* 249 Ill. 206, 94 N. E. 40; *Pratt v. Stone*, 10 Ill. App. 633; *Frazer v. Howe*, 106 Ill. 563; *Union Stockyards Co. v. Conoyer*, 38 Neb. 488, 41 Am. St. Rep. 738, 56 N. W. 1081; *Marshall v. Harney Peak Tin Min. Mill & Mfg. Co.* 1 S. D. 350, 47 N. W. 290; *Kielbach v. Chicago, M. & St. P. R. Co.* 13 S. D. 629, 84 N. W. 192; *McKnight v. Bell*, 168 Pa. 50, 31 Atl. 942; *Moulor v. American L. Ins. Co.* 101 U. S. 708, 25 L. ed. 1077; *McGill v. Young*, 16 S. D. 360, 92 N. W. 1066; *Comptograph Co. v. Citizens' Bank*, 32 N. D. 59, 155 N. W. 680.

Parties may, under the statute, orally contract that the rate of interest on a legal indebtedness shall be 10 per cent, and there is no forfeiture. Such a contract would not be enforced for the amount agreed upon, but would be good for a rate of 7 per cent. *Brockway v. Haller*, 57 Iowa, 368, 10 N. W. 752; *First Nat. Bank v. Fenn*, 75 Iowa, 221, 39 N. W. 279; *Brown v. Cass County Bank*, 86 Iowa, 527, 53 N. W. 410; *Sprague v. Benson*, 101 Iowa, 678, 70 N. W. 731; *Grey v. Callan*, 133 Iowa, 500, 110 N. W. 909; 22 Cyc. 1529.

In charging the jury, it is not necessary that the trial court should duplicate correctly stated propositions of law, even though requested to do so. *Moline Plow Co. v. Gilbert*, 3 Dak. 239, 15 N. W. 1; *State v. Campbell*, 7 N. D. 58, 72 N. W. 935; *State v. Kent* (*State v. Pan-coast*), 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052; *State v. Stout*, 49 Ohio St. 270, 30 N. E. 437; *McHugh v. State*, 42 Ohio St. 154.

Neither appellant nor the land company can complain if the bank

took and held legal title to the land as security. Such question could only be raised by the Federal government. *Michie, Banks & Bkg.* § 259, 1aa; *First Nat. Bank v. Messner*, 25 N. D. 263, 141 N. W. 999.

FISK, Ch. J. This cause was tried to a jury and resulted in a verdict for plaintiff bank in the sum of \$2,285.24. A motion for a new trial upon specifications of errors, including alleged insufficiency of the evidence, also newly discovered evidence, was denied, and the appeal is from both the order denying the motion and the judgment entered pursuant to the verdict.

Plaintiff bank sued to recover damages in the sum of \$2,957.28 for the alleged wrongful and intentional breach of duty by defendants while executive officers of such bank in failing and omitting to collect interest claimed to be due it from the Westhope Land & Loan Company. That a correct understanding of the issues may be had, we here set out the complaint and answer. Omitting formal parts, the complaint (after alleging in the first four paragraphs plaintiff's incorporation, as well as that of the Westhope Land & Loan Company, and the fact that defendant P. S. Hilleboe was, at all times mentioned, the vice president of the bank, and also the president of the Land & Loan Company, and also defendant J. M. Messner's relation to such bank and Land & Loan Company as cashier and secretary respectively) is as follows: "That prior to the 15th day of June, 1905, it was agreed by and between the plaintiff herein and the said Westhope Land and Loan Company that the plaintiff herein would, from time to time, as the needs of the said Westhope Land & Loan Company might require, and upon sufficient real estate security, loan to the Westhope Land & Loan Company such sums of money as might be needed to enable the said Westhope Land & Loan Company to carry on its business, and it was specifically agreed between the said plaintiff herein and the said Westhope Land & Loan Company that when the sums of money so loaned by this plaintiff to the said Westhope Land & Loan Company should be returned and paid to this plaintiff, the said Westhope Land & Loan Company should also pay and return to the said plaintiff herein interest upon each of the said loans at the rate of 12 per cent per annum thereon, and that the security so given to the plaintiff herein should be retained by this plaintiff as security for the said loan until the full amount of said loan with in-

terest thereon at the rate of 12 per cent per annum was repaid to the plaintiff herein, and that all the terms of this said agreement were at all times fully known to both of the defendants herein.

"That pursuant to said agreement the plaintiff herein loaned to the said Westhope Land & Loan Company on the 15th day of June, 1905, the sum of fourteen hundred dollars (\$1,400), on the 4th day of January, 1906, the sum of nine hundred thirty-five dollars (\$935), on August 24th, 1906, the further sum of five hundred fifty dollars (\$550), on August 24th, 1906, the further sum of twelve hundred eighty dollars (\$1,280), on August 24th, 1906, the further sum of five hundred twenty-five (\$525) dollars, and on October 1, 1906, the sum of thirty-six hundred ninety-eight dollars and three cents (\$3,698.03); and that as security for each of said loans, the plaintiff herein received from the said Westhope Land & Loan Company conveyances of certain parcels of real estate, which said real estate so conveyed as security as aforesaid largely exceeded in value the amount of said loans and interest thereon at the rate of 12 per cent per annum.

"That all the said loans were thereafter repaid by the said Westhope Land & Loan Company to this plaintiff without interest, and that these two defendants, without right or authority, and with full knowledge of all the terms of the agreements hereinbefore set forth, and in violation of their duties as cashier and vice president, respectively, of this plaintiff, and with the wrongful intention of defrauding this plaintiff, and with wrongful intention of perverting funds of this plaintiff to their own use, did wrongfully and unlawfully jointly conspire to and did convey and release unto the said Westhope Land & Loan Company the real estate securities held by this plaintiff to secure the payment of the said loans, together with interest thereon, and failed and neglected to collect the stipulated interest on the said loans, all to the plaintiff's damage in the sum of twenty-nine hundred fifty-seven dollars and twenty-eight cents (\$2,957.28), no part of which has been paid, though payment thereof has been demanded.

"That the said Westhope Land & Loan Company has neglected and refused to pay said interest or any part thereof, and is, and for a long time prior hereto has been, insolvent and without any property out of which any judgment against the said company can be collected, either

upon execution or otherwise, and has no property subject to levy under any process whatsoever.

"That the defendants are not now, and long before this action was commenced ceased to be, officers of the plaintiff bank, but are and at all the times herein mentioned have been stockholders and officers of the said Westhope Land & Loan Company, for whose benefit and that of these defendants the securities mentioned in paragraph 7 were released.

"That the loans hereinbefore mentioned were respectively repaid to this plaintiff without interest on the following dates; to wit, January 26th, 1909; September 28, 1909; September 28, 1909; April 1st, 1909; September 28th, 1909; March 13, 1909."

Following is the answer: "Come now the defendants, and for answer to plaintiff's complaint,

"(1) Deny each and every allegation, matter, and thing contained in plaintiff's complaint not hereinafter specifically denied, admitted, or qualified.

"(2) The defendants specifically deny that the alleged contract between the plaintiff and the Westhope Land & Loan Company, set forth in paragraph 5 of plaintiff's complaint, was ever made, or that any contract between the plaintiff and said Land & Loan Company was ever made for the plaintiff to advance said land company moneys and take real estate security therefor, and further deny that the plaintiff ever loaned said Westhope Land & Loan Company any moneys pursuant to any such alleged agreement, and deny that the said Westhope Land & Loan Company ever made any conveyance of any real estate to the plaintiff as security for any moneys borrowed from the plaintiff.

"(3) These defendants specifically deny that they ever released to the Westhope Land & Loan Company any real estate security held by the plaintiff, and specifically allege that the plaintiff made purchases of certain lands, acting through Mr. J. W. Cooper, then cashier of said plaintiff, and now one of the attorneys for the plaintiff, from the said Westhope Land & Loan Company and others, and paid for said lands the amounts set forth in paragraph 6 of plaintiff's complaint, and that the said transfers to the plaintiff were made long prior to the time that the defendant J. M. Messner owned any interest in the said plaintiff bank, or had any connection with it whatsoever, and only a part of said

purchases were from said land company, or were land owned by said company, or in which it had any interest.

“(4) That after said lands were thus transferred to the plaintiff, through the order of the bank examiner and comptroller of the currency, the plaintiff resold the said lands, realizing on said sales the amounts paid by the plaintiff therefor, which said amount was then the full value thereof.

“(5) That at the time of the said sale of the said lands, these two defendants and one Murphy, then president of the plaintiff bank, owned all of the stock of said bank except a few shares owned by Mrs. Murphy, wife of the president, and Mrs. Hilleboe, wife of the defendant, and no other person outside of these had any interest in said plaintiff bank whatsoever, and the sales of said land were made by, and with the consent of, all of these persons.

“(6) That the said plaintiff bank has been dissolved, and all of the depositors have been paid, and any interest they or any person outside of the aforementioned persons, at the time of its dissolution, may have had in the assets of the said bank, was acquired after the act complained of by the plaintiff, and with full knowledge thereof, and no said person was damaged in any manner whatsoever by the sale of the said lands.

“(7) For further defense, defendants allege that prior to the bringing of this action the said plaintiff bank had been dissolved, and that the proceeds thereof had been sold, and all of the affairs of the bank were in the liquidating agent for the stockholders, J. E. Roman, and that said action was not instituted in the name of such liquidating agent, and is being prosecuted without authority from the now liquidating agent, J. L. Page.

“(8) For further defense, the defendants allege that at the time the said lands were sold the plaintiff received full value therefor, and all that could be obtained at the time of said sale, and that it was not injured in any manner whatsoever by reason of said sales, and by the making of said sale prevented the bank from having its charter canceled.

“(9) For further defense, these defendants specifically deny that the plaintiff was injured by any failure or neglect on the part of either or both of these defendants to collect any alleged balance of indebtedness due from the said Westhope Land & Loan Company to the plaintiff,

and these defendants specifically allege that during the month of November, 1909, and long after the plaintiff had sold the land set forth in its complaint with full knowledge of the sale of such lands, and after both of these defendants had sold all of their interests in said plaintiff bank, that the plaintiff purchased from the said Westhope Land & Loan Company assets far in excess of the amount claimed in plaintiff's complaint, a part of which said amount was paid by plaintiff to the said Westhope Land & Loan Company in cash, and the balance, which the defendants allege to be \$3,318.83, was placed on deposit in said plaintiff bank to the credit of the said Westhope Land & Loan Company, and which amount was afterwards paid by the bank, all of which was done at the time when neither of these defendants owned any interest in the said bank, and with full knowledge on the part of the bank of the said sale of the said lands, and without any act on the part of either or both of these defendants.

"Wherefore, the defendants pray that the plaintiff's action be dismissed and that judgment be rendered against the plaintiff and in favor of the defendants for a dismissal of this action."

The issues, in substance, therefore, were: 1st. Whether an understanding was had between the bank and the loan company whereby the former agreed to make loans to the latter and the latter agreed to borrow from the former from time to time moneys at the stipulated rate of 12 per cent upon real estate security?

2d. If such an understanding existed, then whether, in fact, loans were thus made and lands transferred to the bank as security, pursuant thereto, as alleged in the complaint?

3d. If so, did defendants wrongfully release such security as alleged, and

4th. Were all matters in dispute between the parties settled prior to the commencement of this action?

Appellant's counsel contend that each of these issues should have been answered in appellant's favor, and that the finding of the jury to the contrary is not supported in the evidence.

The following facts are not in dispute: Plaintiff is a national banking corporation, with a capital stock of \$25,000; one Geo. Sundberg was its president from its organization in April, 1904, until about August, 1908, when he was succeeded by one Julius K. Rosholt, who was its

president until November or December, 1909, when he in turn was succeeded by one R. H. Murphy, who continued as president until the liquidation of such bank on December 12, 1910; defendant Hilleboe was vice president of the bank until the winter of 1909-10; one W. J. Cooper was its cashier until about August, 1908, when he was succeeded by the defendant Messner, who acted in that capacity until December, 1909, when Cooper again became such cashier, and remained such until August 27, 1910. The Westhope Land & Loan Company was a domestic corporation, engaged in a general land and loan business at Westhope, having its office and place of business in the plaintiff's bank building. It had a capital stock of \$5,000, and defendant Hilleboe, besides being vice president of the bank, was president and managing officer of such loan company until the winter of 1909-10, when it ceased doing business. Cooper, besides being cashier of the bank, was secretary and treasurer of the loan company from May, 1904, until about January 1, 1909, when he was succeeded by Messner. The entire capital stock of the loan company was held by the officers of the bank and their wives.

In the light of the issues and the undisputed facts above stated, we proceed to consider appellant's points in the order presented in his brief.

He contends that the evidence is insufficient to support the verdict, first, because it fails to establish that a contract was made as alleged; second, because it fails to establish that the alleged loans were in fact made, and, third, because it fails to show that the alleged real estate security was wrongfully released as alleged.

In support of their first contention counsel argue that the only evidence to show a contract was the oral testimony of Cooper, the cashier of the bank, who narrated a conversation between himself and Sundberg, the president, which testimony was incompetent and duly objected to for the reason that a contract to pay 12 per cent interest would, under § 6072, Compiled Laws, have to be in writing, also a contract to give real estate security must, to be valid, be reduced to writing under the provisions of § 5888, Compiled Laws. Counsel are no doubt partially correct, but while the district court admitted the testimony, he instructed the jury that if they found there was a contract to pay interest, no more than 7 per cent could be allowed, and this is all that was allowed. The fact that Cooper's testi-

mony does not show a valid and enforceable contract binding the bank to loan and the loan company to borrow is not controlling. Such testimony merely tended to show preliminary negotiations or talks relative to the bank making loans to the loan company on certain terms. While such negotiations did not rise to the dignity of even an executory contract, so as to bind either the bank or loan company, yet we think the proof was admissible in connection with the other proof disclosed in the record tending to show that loans were actually made pursuant thereto or as a result thereof. The books of both the bank and loan company were introduced, as well as other testimony, tending to establish that loans were in fact subsequently made pursuant to such arrangement or talks.

But counsel argue that such oral negotiations were inadmissible even for the purpose of shedding light on the subsequent transactions to indicate whether they were in fact loans and conveyances as security or otherwise, their contention being that "so long as the twelve per cent agreement was not established, even if the subsequent transactions were in fact loans, and the conveyances were in fact security, no recovery of the interest could be had in the action, for the complaint alleged that the interest in question was due under an express contract to pay 12 per cent," and no recovery can be had on a *quantum meruit*. In other words, having failed to prove as alleged a contract for 12 per cent interest, plaintiff is out of court. We deem such argument unsound. Its fallacy, as we view it, lies in the unwarranted assumption that no recovery upon the express contract pleaded can be had for a less sum than that stipulated for by its terms. The contract to pay 12 per cent interest was not illegal, but merely unenforceable because not in writing. The contract was enforceable up to 7 per cent. Section 6072, Compiled Laws, which provides that "interest for any legal indebtedness shall be at the rate of 7 per cent per annum, unless a different rate is contracted for in writing," merely prevents the recovery of a greater sum than 7 per cent. It does not render the contract invalid and thereby compel a resort to the *quantum meruit*. It does not affect the contract at all further than to limit the recovery thereunder. Ample authority exists in support of this construction. *Brockway v. Haller*, 57 Iowa, 368, 10 N. W. 752; *Nevada First Nat. Bank v. Fenn*, 75 Iowa, 221, 39 N. W. 279; *Brown v. Cass County*

Bank, 86 Iowa, 527, 53 N. W. 410; Sprague v. Benson, 101 Iowa, 678, 70 N. W. 731; Grey v. Callan, 133 Iowa, 500, 110 N. W. 909; 22 Cyc. 1529.

These authorities all squarely support the rule that the *contract* may be enforced for the statutory rate. The rule of *Lowe v. Jensen*, 22 N. D. 148, 132 N. W. 661, cited by appellant, is not applicable. That case merely recognizes the general rule that a recovery on the *quantum meruit* cannot be had in an action based solely on an express contract.

This brings us to appellant's contention that the evidence is insufficient to establish that the alleged loans were made by the bank to the loan company. There is much in the record lending support to appellant's view. The form the transactions took, together with other evidence which we will presently notice, upon its face very forcibly corroborates appellant's version that the transfers to the bank were intended to be absolute, and not as security for loans. But the jury found otherwise, and on motion for a new trial, the trial judge, who saw and heard the witnesses testify, refused to disturb the verdict, and under the well-settled rule we are powerless to interfere with such ruling if there is any substantial and competent evidence to support such verdict.

The testimony is very voluminous, and we shall not attempt to review it at length in this opinion, and shall refrain from doing more than giving in a general way the substance thereof as to its most salient features. It is undisputed that the transfers from the loan company to the bank, which it is claimed by respondent were given as security, were absolute in form, and that both the bank's and the loan company's books evidenced purchases and sales, and not security transactions. The loan company was overdrawn in its account in the bank in a large sum when the first deed of transfer which is involved was made and delivered. Upon the receipt of such transfer and others of like kind, the loan company was credited with a deposit in the amount of the full value of the lands transferred, and which deposit more than paid the overdraft, leaving a credit balance subject to check. This is true of the subsequent transactions. Loans in this manner were made to the full value of the securities according to respondent's contention, and this without any record or documentary evidence by note, memorandum, or otherwise, showing the nature of the transaction. Fur-

thermore, Cooper, as cashier of the bank and secretary of the loan company, admits that he drew the deeds and made the entries in the books of both the loan company and the bank, showing upon their face absolute sales instead of security transactions. Not only this, but he, as such cashier, entered the lands so conveyed as property purchased by the bank, and as secretary of the loan company he made entries in its books showing that such land had been sold to the bank. Moreover, he, as cashier of the bank, repeatedly made reports, verified by his oath, to the comptroller of the currency listing these lands as the property of the bank, and stating that they were conveyed on or about the dates mentioned in the deeds in payment of prior indebtedness. He also listed these lands with the assessor as the property of the bank.

At the trial, he testified, among other things, as follows:

Q. You never made any settlement as to the interest or the amount due on those indebtednesses which you claim to be loans secured by these lands?

A. No, sir.

Q. Did you close up your books at the end of each fiscal year in that bank?

A. Yes, sir.

Q. And you took into consideration everything that you had in the way of bills receivable in that bank?

A. In a statement.

Q. Did you ever take into consideration any interest owing on these lands?

A. Not to declare a dividend on.

Q. You never did that?

A. No, sir.

Q. And the only thing in the nature of debt owing to the bank that was not kept a record of in this discount register was four overdrafts which were recorded daily in the individual ledger of the bank book?

A. Yes, sir.

Q. And these debts that you are now claiming were owing by the Land Company, is that right?

A. Yes, sir.

Q. So as a matter of fact there is only one thing that the bank book

did not have a record of as the debts owing to it and that is of the land company?

A. Yes, sir.

Q. You knew as cashier that under the laws of the United States and under your duty by the by-laws of that corporation that you were to keep correct accounts, did you not?

A. Yes, sir.

Q. And you knew that falsifying or making a false account in that bank was criminal?

A. Yes, sir.

Q. Did you not know that you were not keeping those records truthfully, if your entries as to these claims are now true?

A. Yes, sir.

Q. And you knew that at the time you were making that set of books?

A. Yes, sir.

Q. Your statement did show on the books that this property was actually owned by the bank?

A. Yes, sir.

Q. And the same is true with reference to the reports you made to the comptroller?

A. Yes, sir.

Q. And the reports you swore to?

A. Yes, sir.

Q. And that is true of the assessor's report?

A. Yes, sir.

Appellant in his testimony flatly disputes plaintiff's version as to the nature of these transactions, claiming that nothing was said about loans, and no loans were made, and that these land transfers were intended to be and were in fact absolute conveyances, and not given as security. He made the transfers for the loan company and swore positively that the transactions were exactly as the deeds of conveyance, the books of the loan company, and the bank, Cooper's reports to the comptroller, etc., showed them to be. By way of corroboration of appellant it was shown that certain lands other than those directly involved were transferred from the loan company to the bank at the same time and under like conditions as the lands in question, and that such other

lands were always treated as the absolute property of the bank and were sold as such at a large profit, and no accounting made to or asked for by the loan company. The foregoing is in brief the showing made by appellant in support of his contention that the transactions were not loans, but absolute conveyances. In opposition thereto Cooper testified that they were all loan transactions, and that the deeds were to the knowledge of appellant merely given as security for such loans. Cooper's testimony seems to be corroborated, not only by the books of the loan company and of the bank, but by proof of other similar transactions made at or about the same time, wherein the loans with interest were repaid and the lands reconveyed; also by the further proof that after such transfers the loan company was permitted to exercise dominion over the property by farming and improving some of it and by collecting rents and profits from other tracts. As before stated, the jury found in plaintiff's favor on all the issues, and such finding was upheld by the trial court. We are agreed that there is such a substantial conflict in the testimony as to preclude us from interfering with the finding of the jury on this question.

It is next contended that the evidence was insufficient to show that such securities were wrongfully released by defendants without first exacting payment of the interest earned on the loans. In paragraph seven of the complaint, plaintiff alleges a conspiracy between defendants to defraud the bank out of such interest by deliberately releasing such lands without collecting such interest, with the corrupt intention of perverting funds of the bank to their own use. The trial court held as a matter of law that no such conspiracy had been shown, and the action was dismissed as to defendant Messner, leaving Hilleboe as the sole defendant and appellant. We are therefore now to inquire whether there is sufficient evidence to warrant the jury in finding that Hilleboe thus wrongfully released the securities without exacting payment of interest due, and that plaintiff bank was thereby damaged in the amount assessed by the jury? We take it there can be no question regarding the personal liability to the corporation of an officer thereof for damages suffered by it on account of any wrongful or fraudulent misapplication or wasting of corporate funds or property caused by him. 2 Thomp. Corp. 2d ed. § 1421, and authorities cited in note. Indeed, it seems to be conceded, or at least not questioned by appellant's counsel, that lia-

bility exists for any damage shown, provided the deeds were given as security and appellant wrongfully released such security without exacting payment of the interest. Counsel say: "No matter how the bank held these lands, before the defendants could be held liable it was incumbent upon the plaintiff to show by a preponderance of the evidence that these defendants wrongfully released them. It has already been shown that Cooper, both on the bank books and in his reports to the comptroller of the currency, represented to the United States government that the bank owned these lands. The government, because of these representations, became dissatisfied with this condition of the bank. Believing that the bank did own these lands by virtue of the representations made, and thinking that the lands were lying in the bank as a dead weight, the government became dissatisfied with the conditions, and the bank examiner ordered that these lands be changed into active assets.

"Murphy, who was president of the bank, also told Hilleboe and Messner to get these lands out of the bank. He ordered them to transfer these lands for what they were carried on the books of the bank, and if they could not get that amount, to transfer them at a loss, but in any event to get them out of the bank.

"Hilleboe wanted Murphy to take the lands, but Murphy did not want them. Hilleboe testified:

"We talked about the lands and how to get rid of them, how to dispose of them, and told him it was hard to sell them, and we wasn't able to dispose of them, and we asked him if he wouldn't buy these lands, and he said he wouldn't, but he said, "you go to work and get rid of them somehow, and try to get out of them what they are carried on the books for." "

"The object was to dispose of this land and get either the money or bankable paper into the bank in place of it. We worked at that continuously from the time Murphy came there, I believe it was the first time he visited the bank, and at that time he had the biggest share of stock and he wanted to get it fixed up and cleaned up, so it was in bad shape, and he was very much opposed to all that land in the bank.'

"From the time that Murphy wanted these lands gotten out of the bank to the time they were actually transferred from it, the only stockholders or persons interested in the bank were Murphy and his wife, Hilleboe and his wife, and Messner. Cooper had no interest in the bank,

and was in no manner connected with it. Everything that was done was done with full knowledge of the persons interested.

"The evidence not only fails to show that the lands were wrongfully conveyed from the bank, but the testimony affirmatively shows without contradiction and beyond controversy that these lands were transferred from the bank under an arrangement with all of the persons then interested in it, and that everything that was done with reference to the lands in conveying them from the bank was done by these defendants in the utmost good faith. Not only has the plaintiff failed to show that the conveyance of these lands from the bank was wrongful on the part of these defendants, but the defendants have affirmatively shown that it was rightful, and that it was done at the request of both Murphy, who was president of the bank, and of Chapman, the bank examiner."

Respondent attempts to answer this argument by calling attention to the undisputed fact that no interest was paid on these various loans, but merely the principals of the loans were repaid to the bank, and his counsel says: "So that if we have established, and we feel that we have, that a contract was made as alleged, and that Hilleboe had notice of that contract and the lands were released, and in some instances not only released, but transferred to Hilleboe himself, no interest paid to the bank on the money advanced, although large profits were made upon the sale, then we have established beyond question that the lands were wrongfully released without the collection of interest."

Upon this question of alleged wrongful release of these lands by appellant without collecting interest due the bank, as well as the further question as to plaintiff's alleged failure to prove any resulting damage to the bank, we have had no little difficulty in reaching a conclusion. The testimony on this first point is very meager and of a highly unsatisfactory nature. The writer was at first quite strongly inclined to the view that we would not be justified in reversing the judgment on either of these points. These views, however, were not shared in by his associates, and in deference to the majority the writer feels constrained to recede from his first impressions. We are now agreed that, while it appears that such interest was never collected for the bank, there is no proper basis in the evidence for the jury's findings to the effect that such securities were by appellant wrongfully released, as alleged by respondent, or that such bank suffered any resulting damage thereby which it is

entitled to recover. In brief, we are in full accord with the contentions of appellant's counsel on these points.

Having arrived at the above conclusion, it becomes unnecessary to notice the specifications of error based upon rulings at the trial and the instructions of the court to the jury, further than to state that the ruling denying appellant's motion for a directed verdict was erroneous, and we feel constrained not only to reverse the judgment, but we deem it a proper case under the provisions of Compiled Laws, § 7643, to direct judgment to be entered in appellant's favor. It is accordingly so ordered.

**EMERSON-BRANTINGHAM COMPANY, a Corporation v.
D. V. BRENNAN.**

(159 N. W. 710.)

Negotiable instrument act — national commission — uniform laws — note — payable to order — not indorsed — third person — into hands of — by assignment — defenses — subject to — original payee — against.

1. Under the Code of North Dakota and the negotiable instrument act as adopted by the National Commission on Uniform State Laws, a note which is payable to order, and which has not been indorsed, and has come into the hands of a third person by assignment merely, is subject to any defenses which could have been interposed against the original payee.

Note — maker — damages — recoupment — against payee — against assignee.

2. Damages which might have been recouped by the maker of a promissory note in an action against him by the original payee may be also recouped against a mere assignee thereof.

Consideration — absence of — failure of — defense — holder in due course.

3. Absence or failure of consideration for a note is a matter of defense against any person not a holder in due course, and a partial failure of con-

Note.—The right of a transferee, without indorsement, of a bill or note payable or indorsed to the order of transferrer, to protection as a bona fide purchaser, is discussed in a note in 17 L.R.A.(N.S.) 1105, in which the rule is set forth in accord with the case above, that a note transferred by the payee without indorsement is subject, in the hands of the transferee or any subsequent holder, to all the equities existing in favor of the maker against the payee.

sideration is a defense *pro tanto* whether the failure is an ascertained and liquidated amount or otherwise.

Promissory note — suit on — consideration — transfer of land — contract — pleading — demurrer — payee.

4. Where a person sued on a promissory note seeks to prove that part of the consideration thereof was that the payee should purchase and obtain the transfer to him of a certain piece of land, and alleges these facts in a special plea, and the added fact that by reason of the payee's failure to perform his part of the agreement the consideration of the note has failed to the amount of \$1,000, such plea will sustain proof of such contract, and loss and is not vulnerable to a demurrer on the ground that the terms on which the payee was to purchase the property, or the value of the property, or its value at the time of its sale, or the compensation to be paid to the payee, if any, are not stated.

Note — consideration — plea — failure in part — contract — breach of — affirmative relief — defense only — plea of recoupment — set-off.

5. A plea which alleges that the consideration of a note has failed to a certain amount by reason of the breach of one of the terms of its delivery by the payee, but which does not ask for affirmative relief, must be looked upon as a defense or plea of recoupment, and not as a set-off.

On Petition for a Rehearing.

Revised Code — non-negotiable note — counterclaim — unliquidated — another contract — growing out of — notice of assignment — prior to.

6. Under the provisions of §§ 7396 and 7449 of the Compiled Laws of 1913, if C buys from B a non-negotiable note which is made by A to B, A can counterclaim against C an unliquidated claim arising out of another contract but prior to any notice of the assignment in question.

Complaint — counterclaim — damages — failure to convey land — demurrer.

7. A complaint or counterclaim which asks to recover damages for the failure to convey land is sufficient as against a demurrer if it merely alleges a promise to convey, and that the plaintiff was damaged by the breach thereof in an amount stated. Such damages are general, and need not be specially pleaded.

Opinion filed May 22, 1916. Rehearing denied October 12, 1916.

'Action to recover on a promissory note.

Appeal from the District Court of Ramsey County, *C. W. Buttz, J.*
Judgment for plaintiff. Defendant appeals.

Reversed.

Statement of facts by BRUCE, J.

This is an action brought by the assignee of a promissory note to recover against the maker thereof. The amended complaint alleged:

"(1) That the plaintiff now is and at all the times hereinafter mentioned has been a corporation duly organized and existing under and by virtue of the laws of the state of Illinois, and licensed to transact business within the state of North Dakota.

"(2) That heretofore and for valuable consideration the defendant made and delivered to one Robert W. Madeford, his certain promissory note dated January 17, 1912, wherein he promised to pay to the order of the said Robert W. Madeford, for value received, on October 1, 1912, the sum of \$700, with interest at the rate of 8 per cent per annum from date until paid.

"(3) That thereafter and before the maturity of said note, for a valuable consideration, the said Robert W. Madeford, sold, assigned, transferred, and delivered said note to the Gas Traction Company, a foreign corporation, having its principal place of business in the city of Minneapolis, Minnesota; and thereafter, for a valuable consideration, the said Gas Traction Company, sold, assigned, indorsed, and delivered said note to the plaintiff, which has ever since been and now is the owner and holder thereof.

"(4) That no part thereof has been paid.

"Wherefore plaintiff demands judgment against the defendant for the sum of \$700, with interest thereon at the rate of 8 per cent per annum from January 17, 1912, and costs of suit."

The amended answer was as follows:

"(1) The defendant in this action admits paragraphs 1 and 11 of the complaint.

"(2) He alleges that he has not sufficient knowledge or information to form a belief as to whether the note described in paragraph 2 before the maturity of the same was sold, assigned, or delivered to plaintiff, but alleges on information and belief that the same was not indorsed to the plaintiff prior to the commencement of this action, and alleges that the plaintiff is not a bona fide holder of said note in due course.

"(3) For a counterclaim in this action against the said Robert W. Madeford, payee of said note and against plaintiff (said note),

this defendant alleges that as an inducement held out by the said Madeford, to purchase from him the west half of section thirty-two (32), township one hundred sixty-three (163), range sixty-six (66), the said Madeford agreed to and did become the defendant's agent to purchase for him the northwest quarter of section five (N.W. $\frac{1}{4}$ 5) in township one hundred and sixty-two (162), range sixty-six (66), in Towner county, N. D., and to procure the title for defendant; that relying upon said inducement and said Madeford's promise to do so, and as part consideration therefor, defendant purchased said west half of section thirty-two aforesaid, from said Madeford, that afterwards and prior to the alleged transfer or assignment of said note for \$700 herein, and prior to any notice to defendant of such alleged transfer or assignment, said Madeford refused to act as defendant's agent in the purchase or procuring title to said northwest quarter of section five (N.W. $\frac{1}{4}$ 5) in township 162, range 66, for defendant, and that afterwards and prior to the commencement of this action, the said Madeford obtained title to said northwest quarter of section 5 in township 162, range 66, in his own name, and, as defendant is informed and believes, sold and disposed of the same; that said Madeford thereby became trustee for said defendant in regard to said land, and that by reason of his refusal and failure to act as agent for defendant in procuring title to said land as above set forth and by reason of said Madeford's sale and disposal of said land (N.W. $\frac{1}{4}$ 5-162-66) defendant has been damaged in the sum of \$1,000 by which amount the consideration for said agreement in regard to the land in section thirty-two (32), aforesaid, has failed."

Then there followed another or fourth paragraph which was identically the same as the third, with the exception that the word "defense" instead of counterclaim was used in the first line thereof. Then followed a prayer for a judgment dismissing the action, with costs.

To this answer a demurrer was interposed on the ground "that the alleged counterclaim contained in the defendant's amended answer does not state facts sufficient to constitute a cause of action or a counterclaim in favor of the defendant and against the plaintiff. Our position is that the defendant cannot interpose a counterclaim; that the statute which counsel has read, namely, Comp. Laws 1913, § 6943, provides, 'In the hands of any holder other than a holder in due

course, a negotiable instrument is subject to the same defenses as if it were non-negotiable.' There is not one word or syllable there concerning counterclaims; it is not therefore subject to counterclaim, and our statute on the subject of counterclaim is clear upon that point. I make the further proposition that the damages attempted to be set off are unliquidated and uncertain. If the paragraph of the defendant's answer which has been amended constitutes anything at all, it constitutes an attempt to set up a defense as against the collection of the note, and is not a counterclaim; that is, it is unliquidated—unfixed in amount, and it is not a defense or subject to be pleaded as a defense in this action. There is nothing in the answer as a basis for determining any damages, even though unliquidated damages were the proper subject of set-off, it not being alleged in the answer on what terms the said Madeford was to act as agent for the defendant,—on what terms he was to purchase the property referred to, the value of the property at the time of its purchase, the value at the time of its sale, the compensation to be paid the said Madeford or any other of the necessary elements of damages to be alleged in order to leave the defendant open to proof of any damages. The plaintiff does not wish this ground of objection to be understood as waiving in any way its claim that unliquidated damages are not a proper subject of set-off." This demurrer was sustained, and the defendant not having asked leave to amend his answer, or taking further action, the plaintiff then introduced his evidence, and at the close thereof defendant asked for a verdict on the ground "that the plaintiff had failed to show ownership in the note; that the defendant's answer is a sufficient defense to the amount of the note is admitted by the demurrer, and is a valid defense and counterclaim, and for the further reason that the note in suit is not properly identified by any proof in this action as being the property of the plaintiff." The court then denied this motion for a directed verdict, and, on a motion being made by the plaintiff for one in its favor, the same was granted. Defendant then moved for judgment notwithstanding the verdict, and, the motion being denied, has appealed to this court.

M. H. Brennan and D. V. Brennan, and Theodore Koffel, for appellant.

The note in question, being non-negotiable, is subject to the same defenses as any other chose in action, and as negotiable paper, subject to all equities between the original parties. The note is payable to order, but not indorsed by payee. Plaintiff holds merely as assignee. Rev. Codes 1905, §§ 6360, 6808, Comp. Laws 1913, §§ 6943, 7396; Comp. Laws 1899, § 5222; Carter v. Joseph, 48 Mich. 615, 12 N. W. 876.

In the matter of damages for failure to comply with a contract for the sale of realty, the law fixes the measure of damages, and they are capable of ascertainment; the question of value being on the same principle as any value of goods sold without an agreement as to the price, or *quantum meruit* in labor cases. Tidewater Quarry Co. v. Scott, 105 Va. 160, 115 Am. St. Rep. 864, 52 S. E. 835, 8 Ann. Cas. 736; McHard v. Williams, 8 S. D. 381, 59 Am. St. Rep. 766, 66 N. W. 930; 34 Cyc. p. 698, note 33; Rev. Codes 1905, § 3261, Comp. Laws 1913, § 4325; Speers v. Sterrett, 29 Pa. 192; Appleby v. Burrett, 28 Pa. Super. Ct. 349; Bryce v. Parker, 11 S. C. 337.

Such damages are a proper subject of set-off, against a note in the hands of a mere assignee. Hunt v. Gilmore, 59 Pa. 450; Russell v. Miller, 54 Pa. 154; 34 Cyc. 700, notes 35, 36; Parsons v. Sutton, 66 N. Y. 92; Empire Transp. Co. v. Boggiano, 52 Mo. 294; Morrison v. Lovejoy, 6 Minn. 319, Gil. 224; Bidwell v. Madison, 10 Minn. 13, Gil. 1; Bliss, Code Pl. § 379; Pom. Code Rem. § 798; St. Louis Nat. Bank v. Gay, 101 Cal. 286, 35 Pac. 876.

Defendant has the right to set off against an assignee of a non-negotiable note or claim, any claim which he might have had against the assignee, arising also on contract. Michigan Stove Co. v. Pueblo Hardware Co. 51 Colo. 160, 116 Pac. 342; Davis v. Rawhide Gold Min. Co. 15 Cal. App. 108, 113 Pac. 898.

Defendant can also counterclaim against the assignee, any just claim he held against the payee or original party, existing prior to the assignment. Mascarel v. Lynch, 165 Cal. 476, 132 Pac. 1036; Sheafe v. Hastie, 16 Wash. 563, 48 Pac. 246.

The defendant's evidence is entirely sufficient. Plaintiff has shown no right to hold or collect the note in question, and it being non-negotiable, and a defense being made, the failure to show the amount

due on the principal obligation is fatal. *Security Bank v. Kingsland*, 5 N. D. 263, 65 N. W. 697.

Where a pleading is only attacked by motion or objection to the introduction of evidence on the trial, it will be construed more liberally in favor of the pleader than when attacked by demurrer. *Christofferson v. Wee*, 24 N. D. 506, 139 N. W. 689, and cases cited; *Watson v. McLench*, 57 Or. 446, 110 Pac. 482, 112 Pac. 416.

Henry G. Middaugh and Rollo F. Hunt, for respondent.

A counterclaim must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action. *Comp. Laws 1913*, § 7449; *Merrick v. Gordon*, 20 N. Y. 93.

Mere collateral or independent agreements cannot be set up as counterclaims. *American Gas & Ventilation Mach. Co. v. Wood*, 90 Me. 516, 43 L.R.A. 449, 38 Atl. 548; 34 Cyc. 623-625.

A set-off can only take place in actions on contracts for the payment of money, while a recoupment is confined to matters arising out of and connected with the transaction or contract upon which the suit is brought, and regardless of whether they are liquidated or unliquidated, and this right was given by the common law. *Christofferson v. Wee*, 24 N. D. 506, 139 N. W. 689; 2 *Estee*, Pl. 3d ed. § 3364; 34 Cyc. 682; *Northwestern Port Huron Co. v. Iverson*, 22 S. D. 314, 133 Am. St. Rep. 920, 117 N. W. 372; *Comp. Laws 1913*, § 6943; 8 Cyc. 62.

Counterclaims and set-offs are of statutory origin while recoupment was known to the common law.

Reason and justice require that "defenses" be limited to recoupment or at most to liquidated set-offs. 34 Cyc. 642, 643.

A set-off must be liquidated while a recoupment may or need not be. 34 Cyc. 696; *Winder v. Caldwell*, 14 How. 434, 14 L. ed. 487.

In this case the standard for the measurement of damages is the difference between the cost and the value of the land. But in their pleading—their so-called counterclaim—there is no allegation touching these matters, and an objection at the trial is sufficient. *Strehlow v. McLeod*, 17 N. D. 457, 117 N. W. 525, 17 Ann. Cas. 423.

BRUCE, J. (after stating the facts as above). The main question to be determined is whether the trial court erred in sustaining the demurrer to the answer. It is perfectly clear to us that the defense, if properly pleaded, could be interposed as against the plaintiff. Although the note was a negotiable instrument in form, it was assigned to the plaintiff, and not negotiated. Section 7396 of the Compiled Laws of 1913, provides that "in the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense existing at the time or before notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange transferred in good faith and upon good consideration before due." Section 6943 provides that "in the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect to all parties prior to the holder."

It was admitted by the demurrer that the note had been made payable to Robert W. Madeford, but was not indorsed by him when transferred to the plaintiff. It was therefore to that extent non-negotiable, and the plaintiff took it subject to all of the defenses which could have been interposed if the suit had been brought by the original payee.

It is not necessary even to go to cases for authority. "In order that one may be a holder in due course it must have been negotiated to him." Section 6937 Compiled Laws of 1913. "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder completed by delivery." (Comp. Laws 1913, § 6915.) "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable." Comp. Laws 1913, § 6943.

Nor is there any merit in the contention that the claim or amount for which the defendant seeks to recoup is not liquidated. No matter what is or may have been the rule in cases of set-off, the damages in

recoupment are not required to be liquidated. 34 Cyc. 643; Hatchett v. Gibson, 13 Ala. 587; Sedgw. Damages (1st ed.) 461.

The term "recoup," says the supreme court of New York in Ives v. Van Epps, 22 Wend. 155, is synonymous with defalc or discount. It "is now uniformly applied where a man brings an action for breach of a contract between himself and the defendant; and the latter can show that some stipulation in the same contract was made by the plaintiff, which he has violated, the defendant may, if he choose, instead of suing in his turn, recoup his damages arising from the breach committed by the plaintiff whether they be *liquidated* or not."

Not only is this the general law, but § 6913, Comp. Laws 1913, expressly provides that "absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained and *liquidated* amount or otherwise."

Nor is there any merit in the contention that the plea was vulnerable to a demurrer because it did not state "on what terms the agent Madeford was to purchase the property for the defendant, the value of the property at the time of the purchase, the value at the time of its sale, the compensation to be paid the said Madeford, or any other of the necessary elements of damages to be allowed in order to leave the defendant open to proof of any damages."

The Code provides that pleadings are to be liberally construed, and the answer clearly admits of the construction that no compensation for damages were agreed to be paid, but that such services were to be a part of the consideration of the note. While as far as the value of the land and the price that defendant was to pay for it are concerned, these were evidentiary matters merely. The answer alleged that the amount of the consideration had failed to the extent of \$1,000, and this was sufficient at any rate against a demurrer. See Guild v. More, 32 N. D. 432, 155 N. W. 48.

Nor is it necessary for us to determine whether the claim of the defendant was a proper subject of counterclaim or set-off. In no part of the answer, indeed, was a set-off pleaded. Paragraph 4 was clearly merely a plea in recoupment, and though the general term "counterclaim" was used in paragraph 3, since no prayer for affirmative relief was asked and the plea merely alleged that the consideration

had failed to the amount of \$1,000, a defense merely was pleaded, or what would more properly be termed facts in mitigation of damages. Failure of consideration, it is true, must be specially pleaded, but here there was a special plea.

It follows from the above that the trial court erred in sustaining the demurrer to the defendant's amended answer. The judgment of the District Court is, therefore, reversed, and the cause remanded for further proceedings according to law.

On Petition for Rehearing filed October 12, 1916.

BRUCE, J. A petition for rehearing has been filed in which, among other things, it is claimed that the decision of the court is based upon "the fact wrongly assumed, that the matter set forth in the answer constitutes what is known as a recoupment." It is claimed that there is no allegation in the answer that any of the transactions mentioned in the answer formed the consideration of the note, and that the record also negatives this fact."

We think, however, counsel is in error in so far at least as the record is concerned. This seems to disclose that Brennan had purchased from Madeford the W. $\frac{1}{2}$ of section 32, twp. 163, R. 66, and had given him in part payment a deed to a brick building in Devils Lake. There was then some question raised by Madeford about some back payments due on this building to a certain building and loan association. Brennan then took back the brick building, and in its place gave Madeford the \$700 note and a deed to another house. It is clear to us that this evidence can only be construed in one way, and that is that the consideration of the giving of the note and the transfer of the new building was the transfer of the W. $\frac{1}{2}$ of section 32, and the promise of agency mentioned.

There is merit, however, in plaintiff and respondents' contention that these facts were not pleaded, and that the counterclaim or further defense (for the counterclaim was both pleaded as a counterclaim and as a further defense) nowhere stated that the promise of agency was in any way a consideration for the note, and that therefore the counterclaim was demurrable if intended to be pleaded for the purposes of recoupment. If this were all there were to the matter, we would be

inclined to think that the verdict was properly directed for the plaintiff, as the answer had elsewhere admitted that the note was given for a valid consideration.

It is, however, claimed, and we think with merit, that the plea could properly be considered as an independent cross demand or set-off, and, such being the case and even though no affirmative judgment was prayed for, yet if the same was pleaded both as a set-off and as a defense, we believe that the defendant would be entitled to a set-off to at least the amount of the claim against him, if damages to that amount were shown, that is to say, if the matter was one of set-off at all, and if it was otherwise properly pleaded.

The controversy before us arises not between the original parties, but between the original maker of the note and the assignee thereof. The question is, If I buy from B a non-negotiable note which is made by A to B, can A counterclaim (not recoup) against me an unliquidated claim arising out of another transaction, but prior to any notice of the assignment in question?

We think he may. Section 7396 of the Compiled Laws of 1913 provides that "in the case of an assignment of a thing in action the action by the assignee shall be without prejudice to any set-off or other defense existing at the time or before notice of the assignment." It will be noticed that in this section the technical word "set-off," and not recoupment, or even counterclaim, is used, and we think that the word is used advisedly.

The term set-off includes any right of action arising out of contract or ascertained by the decision of the court and existing at the commencement of the action. Phillips, Code Pl. § 254; 7 Words & Phrases 6444; Abbott's Law Dict.

The reason indeed for recoupment or set-off at all is the avoidance of a multiplicity of actions, and the theory on which an off-set is allowed against the assignee of a chose in action is that he has merely purchased an obligation or a promise, and that, if outstanding against that promise is still another, the two should in all justice be counterbalanced.

There is yet another question to determine, and that is whether the claim must have been liquidated. On this there is some conflict among the authorities. "Some courts," says Mr. Phillips, "have held that unliquidated damages arising out of contract may be the subject of

set-off, while others hold that set-off must be restricted to liquidated demands. Perhaps the weight of authority, and the better reason, are in favor of allowing unliquidated damages to be made the subject of set-off in the absence of statutory provision to the contrary." See Phillips, Code Pl. § 254.

Again in Bliss on Code Pleading, we find the following: "It is an interpolation to add to the express authority to counterclaim 'any other cause of action arising also on contract' the proviso that the action or the counterclaim shall be for the recovery or counter-recovery of liquidated damages." Bliss, Code Pl. §§ 378, 379.

We agree with the conclusion of the last writer that for us to insert in § 7449, and before the word "contract," the word "liquidated" (and this we must do in order to sustain the contention of the plaintiff), would be for us to legislate upon the subject, and this we can hardly do.

We must bear in mind that we are construing the provisions of the new Code of Civil Procedure, and not the common law. We cannot help but believe that in making that revision the unqualified word set-off was used advisedly, and that if the legislature had intended that the demands should have been liquidated they would have said so. Pom. Code Rem. 3d ed. §§ 737, 742.

In saying this we are not unmindful of the *dicta* of Chief Justice Spalding in the case of Christofferson v. Wee, 24 N. D. 506, 139 N. W. 689, in which he may seem to have intimated that a set-off must be liquidated. In the case, however, the chief justice was not construing the word "set-off" as used in our present statute, but was merely stating what the common law was upon the subject.

But was the plea sufficiently definite in its allegation of damages? In other words was it vulnerable to the objection that "there is nothing in the answer as a basis for determining any damages, it not being alleged on what terms the said Madeford was to act as agent for the defendant—on what terms he was to purchase the property referred to, the value of the property at the time of its purchase, the value at the time of its sale, the compensation to be paid the said Madeford, or any other of the necessary elements of damages to be alleged in order to leave the defendant open to proof of any damages."

We think it was not, and though the plea refers to some matters outside of itself, these references are not necessary and may be looked

upon as surplusage. It certainly shows a contract to purchase and a purchase from Madeford by the defendant Brennan of the N. W. $\frac{1}{2}$ of section 32, and as a part consideration of such purchase, the promise of Madeford to act as defendant Brennan's agent in the purchase of the N. W. $\frac{1}{4}$ of section 5, and to procure the title thereto.

It also clearly alleges a breach of this agreement on the part of Madeford, and alleges that the defendant's damages arising therefrom amounted to the sum of \$1,000. This we believe to be sufficient, and the reference to section 32 may be considered as surplusage except in so far as the purchase of the land in section 32 served as a consideration for the promise in regard to the land in section 36.

The allegation of damages, too, we deem to be sufficient. No special damages indeed are required to be pleaded, as in such a case as this the statute fixes the measure. That statute is as follows:

Comp. Laws 1913, § 7151. "The detriment caused by the breach of an agreement to convey an estate in real property is the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach and the expenses properly incurred in examining the title with interest thereon, and in preparing to enter upon the land and the amount paid on the purchase price, if any, with interest thereon from the time of the breach."

Not only is this so, but general damages are nowhere required to be specially pleaded, and the damages which can be recovered in this case and which are the difference between the value of the land and the amount agreed to be paid therefor are certainly general damages. A bill of particulars might perhaps have been asked in the case, and the value agreed to be paid, and the worth of the land have been thus required to be given, but the agreement at least was sufficiently pleaded, and the general allegation of a damage of \$1,000 was certainly sufficient as against the demurrer.

The petition for a rehearing is denied.

ALEXANDER McKENZIE, Ruth Rodman, Amy Rodman v. CITY OF MANDAN, County of Morton, O. H. Killand, County Treasurer, H. H. Harmon, County Auditor.

(160 N. W. 852.)

City council — bids — advertising for — cash-payment basis — interest — rate of — mandatory — pleading — statutes — compliance with.

1. Section 3705 of the Compiled Laws of 1913, which provides, among other things, that in advertising for bids the city council shall call for bids upon a basis of cash payment, and that "the city council may also require bidders to state the rate of interest the warrant shall bear," is mandatory in its nature, and a pleading does not show a compliance with the statute which admits that the advertisement "did not call for bids upon a cash basis or require the bidders to state the rate of interest the warrant should bear," and merely alleges "that part of the proposals for bids which the city commission acted upon and considered at the time of the awarding of the contract was in fact upon a cash basis, and the rate of interest was in fact stated in the said proposals for bids."

Advertisement for bids — error in — statute — compliance with — bidders — others precluded from — by such error — contract.

2. A defect in an advertisement for bids under the provisions of § 3705, Compiled Laws of 1913, is not cured, even though all the bidders bid upon a cash basis and state the rate of interest, if any others are precluded from bidding on account of a belief that because of a defect in the advertisement any contract that would be entered into would be illegal.

Local improvement — commissioners — bids — failure to advertise for — assessment — set aside — action to — court — reassessment — amount of — determination — contract.

3. Where a local improvement is completed, but the commissioners failed to advertise for bids as required by § 3705, Compiled Laws 1913, and an action is brought to set aside the assessment, the court should himself make a reassessment under the provisions of § 3715, Compiled Laws 1913, in so far as the objector is concerned, and should ascertain "the true and just amount which the property attempted to be so assessed by said special assessment should pay." In determining the amount that should be paid, however, the total cost of the improvement should not be arbitrarily fixed at the amount paid for the work or at the amount of the bid which was accepted, but at the reasonable cost of such improvement, but not exceeding the amount of the contract.

Opinion filed December.

Appeal from the District Court of Morton County, *S. L. Nuchols, J.*
Action to set aside a special assessment and to enjoin the collection
of the same.

Judgment for plaintiffs. Defendants appeal.

Reversed.

L. H. Connolly, for appellants.

Where a city advertises for bids on a public improvement, and fails
to cover and insert material matters, such errors may be cured by the
bidders and the bids themselves. *Fuerst v. Semmler*, 28 N. D. 411,
149 N. W. 115; *McKenzie v. Mandan*, 27 N. D. 546, 147 N. W. 808.

W. H. Stutsman, for respondents.

When a city advertises for bids for a public improvement and asks
bidders to state the rate of interest which the warrants to be issued
therefor should bear, all bidders must comply with such advertise-
ment. *McKenzie v. Mandan*, 27 N. D. 546, 147 N. W. 808.

BRUCE, J. This case has been here before. 27 N. D. 546, 147
N. W. 808. On the former appeal we held that the provisions of §
2780, Revised Codes 1905, Comp. Laws 1913, § 3705, that the city
council "may require bidders to state the rate of interest the warrant
shall bear" were mandatory. We, however, incidentally stated that
the defect in the advertisement in this respect might be cured by
the fact that all the bids were in fact upon a cash basis and gave
the rate of interest which the warrant, if any, should bear.

The present appeal is from an order sustaining a demurrer to the
answer and entering judgment in favor of the plaintiffs. The question
at issue is the sufficiency of paragraph 4 of the answer, which alleges
that; "as to paragraph 8 of said complaint, the defendant admits that
the advertisement for bids did not call for bids upon a cash basis
or require the bidders to state the rate of interest the warrants should
bear to be accepted by them in payment for the work, but defendant
alleges the fact to be that the said assessment is not invalidated by
the said omission for the reason that part of the proposals for bids
which the city commission acted upon and considered at the time of
the awarding of the contract was in fact upon a cash basis, and the
rate of interest was in fact stated in the said proposals for bids."

We are satisfied that the allegation of the answer was not sufficient

to overcome the objection raised in 27 N. D. 546. We have no means of knowing the nature of the other bids and therefore of knowing the full effect of the omission in the advertisement. The advertisement being irregular, the burden of proof and of allegation is certainly upon the city to show that no detriment was occasioned thereby.

Counsel for respondent also raises the question that the language used in the opinion in 27 N. D. 546, was too sweeping and should be modified so as to state that a defect in the advertisement can in no event be cured, even though all the bidders bid upon a cash basis and state the rate of interest, if any others are precluded from bidding on account of a belief that, because of the defect in the advertisement, any contract that would be entered into would be illegal. We believe that there is merit in this contention, and that the language of the opinion should be so modified.

Our conclusion from what we have above stated is that the trial court did not err in sustaining the demurrer to the complaint.

We are of the opinion, however, that he should not have entered the judgment which is appealed from, and that our statutes do not contemplate that one who has been benefited by an improvement shall escape all liability because of an error or omission in the proceedings.

Section 3713, Comp. Laws 1913, provides that "in all cases where any assessment, or any part thereof, as to any lot, lots or parcels of land assessed under any of the provisions of this article, or of any law of any city prior to this article, *for any cause whatever, whether jurisdictional or otherwise, shall be set aside, or declared void by any court*, the city council shall, without unnecessary delay, cause a reassessment or new assessment to defray the expense of such improvement to be made, . . . and in all cases . . . where any court shall hereafter set aside or declare void any assessment upon any lot or parcel of land *for any cause*, the said lot or parcel of land may be reassessed or newly assessed from time to time, until each separate lot, piece or parcel of land has paid its proportionate part of the costs and expenses of such improvement, as near as may be; provided, that when any special assessment shall be declared void, or set aside by judgment of the supreme court, for a cause affecting other like assessments, all assessments so affected may be vacated by resolution of the city council, and thereupon a reassessment of the property affected

thereby shall be made as herein provided, and may bear interest as hereinbefore provided."

Section 3714, Comp. Laws 1913, provides that "*no error or omission which may be made in the proceedings of the city council, or of any officer of said city in referring, reporting upon, ordering or otherwise acting concerning any local improvement provided for in this article, or in making or certifying any assessment, shall vitiate or in any way affect any such assessment, but if it shall appear that by reason of such error or omission substantial injury has been done to the party or parties claiming to be aggrieved, the court shall alter such assessment as may be just and the same shall then be enforced.*"

Section 3715, Comp. Laws 1913, which seems directly applicable to the present action reads as follows: "*Whenever any action or proceeding shall be commenced and maintained before any court to prevent or restrain the collection of any special assessment or part thereof, made or levied by the officers of any city for any purpose authorized by law, . . . and such assessment shall be held to be void by reason of noncompliance with this article, the court shall determine the true and just amount which the property attempted to be so assessed by said special assessment should pay, to make the same uniform with other special assessments for the same purpose, and the amount of such assessments as the same appears on the assessment list thereof, shall be prima facie evidence of such true and just amount, and judgment must be rendered and given therefor against the party liable for such special assessment, without regard to the proceedings had for the levy thereof, and such judgment shall be a lien upon the property upon which a special assessment shall have been levied, of equal force and effect as the lien of special assessments, and the lien of such special judgment shall be enforced by the court in such action; provided, that no action for either of said purposes shall be maintained unless it is commenced within six months after such special assessment is approved, and in case of such assessment heretofore approved, within six months after this article takes effect.*"

It seems clear from a perusal of these statutes that instead of entering the judgment appealed from, the court should have made a reassessment as far as the plaintiff is concerned under the provisions of § 3715, and upon the canceling of the tax or special assessment for-

merly levied should have required the payment of this new amount. The statute requires, in such a case, an assessment against the objector of "the true and just amount which the property attempted to be so assessed by said special assessment should pay, to make the same uniform with other special assessments for the same purpose."

It is clear, however, that in determining the amount the plaintiff shall pay, the total cost of the improvement should not be arbitrarily fixed at the amount actually paid for the work or at the amount of the bid which was accepted, but at the reasonable cost of such improvement, but not exceeding the contract price.

The judgment of the District Court is reversed and the cause is remanded for further proceedings according to law and as outlined in this opinion.

CHRISTIANSON, J. (concurring in part and dissenting in part). I concur in a reversal of the judgment in this case, but I am unable to concur in that portion of the opinion which holds that the demurrer to the answer was properly sustained.

The question involved on this appeal arises on a demurrer to the answer, and involves the sufficiency of the advertisement for bids for the construction of a sewer. The majority opinion holds that the advertisement was jurisdictionally defective, and that by reason of such defect the assessment subsequently levied was invalid. On a former appeal (*McKenzie v. Mandan*, 27 N. D. 546, 147 N. W. 808), this court held that the complaint (which, among other things, alleged an arbitrary apportionment of the costs of construction without regard to benefits) stated a cause of action. When the case had been remanded to the district court, the defendants interposed an answer wherein this allegation of the complaint is denied, thereby making it an issue of fact whether the special assessment commission did assess the benefits. Hence, this part of the cause of action is not involved on this appeal.

The complaint also alleges that the board of city commissioners of Mandan, on November 29, 1909, by ordinance, created and established sewer district number one and defined the boundaries thereof, and that the property involved in this action is contained within such improvement district.

It is further alleged in the complaint that the board of city com-

missioners on December 27, 1909, by resolution, authorized the president to procure plans and specifications for the construction of a sewer system; and that on April 11, 1910, the board by resolution duly accepted the plans and specifications for the construction of such sewer system in sewer improvement district number one, as prepared by the city engineer; that bids were thereafter advertised for by publication in the official paper of the city; that on May 9, 1910, the bids were opened and the contract for the construction of the sewer awarded to one James Kennedy for the agreed price of \$45,875.75. "That thereafter, and during the year 1911, said sewer was constructed according to the plans and specifications above referred to." That on July 25, 1911, the special assessment commission made an assessment for the cost and expense of constructing the sewer and assessed and determined the benefits that would accrue to the several lots by the construction of the sewer; that on the 11th of September, 1911, the board of city commissioners of said city approved the assessment made by the special assessment commission and thereafter certified the same to the county auditor in the manner provided by law.

Section 3705, Compiled Laws 1913, provides: "The city council shall then cause proposals for said work to be advertised for in the official paper of such city twice, once in each week for two consecutive weeks, which advertisement shall specify the work to be done according to the plans and specifications therefor on file in the auditor's office and shall call for bids therefor upon a basis of cash payment for said work, and state the time within which such bids will be received, and within which such work is to be completed. The city council may also require bidders to state the rate of interest the warrants shall bear (not exceeding 7 per cent per annum), which are to be received and accepted by them at par in payment for such work."

Section 3708, Compiled Laws 1913, provides: "The city council or city commission shall have the right to reject any and all bids for work to be done under this article, if, in its opinion, the interests of the city will be best subserved by so doing, and such work may be performed directly by the city by the employment of labor and purchase of material, or in any other manner in which the city council or city commission may deem proper in each particular case, and payment for the construction thereof may be provided for by special

assessment in the same manner as if said work had been performed by contract, or the city council, or the city commission may readvertise for other bids, but if such bids are not rejected the contract shall then be awarded to the *responsible* bidder, whose bid is the lowest, upon the basis of cash payment therefor, providing said bidder shall have complied with the foregoing requirement; . . . provided, that the city council or city commission shall, before adopting or rejecting any bids, require the city engineer, or may employ a competent engineer to make a careful and detailed statement of the estimated cost of such work."

Section 3714, Compiled Laws 1913, reads: "*No error or omission which may be made in the proceedings of the city council, or of any officer of said city in referring, reporting upon, ordering or otherwise acting concerning any local improvement provided for in this article, or in making or certifying any assessment, shall vitiate or in any way affect any such assessment*, but if it shall appear that by reason of such error or omission substantial injury has been done to the party or parties claiming to be aggrieved, the court shall alter such assessment as may be just and the same shall then be enforced."

The advertisement for bids involved in this case reads as follows:

Proposals for bids on sewer system.

Notice is hereby given that sealed proposals will be received at the office of the city auditor on or before the 9th day of May, 1910, at the hour of 8 o'clock P. M., and to be opened at the last-mentioned date, and heard at a public meeting of the board of city commissioners of the city of Mandan, North Dakota, to be held at said time and place for the construction of a sanitary sewer system for sewer improvement district number one, in said city of Mandan.

All bids must be accompanied by a certified check drawn to the order of the president of the board of city commissioners of Mandan, North Dakota, for \$500.

The following is the amount of work to be done and the materials to be furnished, and completion of said work and upon which bids will be compared. (Here follows description of work to be performed and materials to be furnished.)

Each proposal must be inclosed in a sealed envelop, indorsed, "Pro-

posal for sewer in Sewer District Number One," and to be addressed to the city auditor of the city of Mandan, North Dakota.

Bidders must specify in their proposals that should the above work be awarded to them, they will bind themselves to finish and complete the same by September 1st, 1910.

The plans and specifications of the work can be examined at the office of the city auditor of the city of Mandan, North Dakota, and at the office of R. E. Wickman, consulting engineer, Grand Forks, North Dakota.

The board of city commissioners of the city of Mandan, North Dakota, reserve to themselves the right to accept or reject any or all proposals for the above work, as they may deem best for the interest of the city.

By direction of the board of city commissioners of the city of Mandan, North Dakota.

Lee Nichols,
City Auditor.

Plaintiffs contend that this advertisement does not comply with the provisions of § 3705, Compiled Laws, *supra*, in this that it fails to call for bids upon a cash basis or require holders to state the rate of interest the warrants shall bear, and that this defect or omission in the advertisement renders the subsequent proceedings, including the assessment, invalid. The majority opinion upholds the contentions of the plaintiffs and it is from the majority's holding on this question that I am compelled to dissent.

Section 3705, *supra*, recognizes two modes of payment: One by cash, and the other by warrants. It is only in case advertisements are called for upon a basis of payment by warrants that the interest becomes material. And every person desirous of bidding knows that there are only two modes of payment,—either by cash or by warrants.

The city council or commission is authorized to establish and maintain a general sewerage system for the city. Comp. Laws 1913, § 3697. It is the tribunal created by the laws of this state to create a sewer district (Comp. Laws 1913, § 3698), and to fix the size and form thereof (Comp. Laws 1913, § 3699), and to determine upon the necessity for the construction or alteration of sewers in the city. Comp. Laws

1913, §§ 3702, 3704. It is also the body empowered to pass upon the various bids submitted, and in that capacity it is invested with authority and has "the right to reject any and all bids, . . . if, in its opinion, the interests of the city will be best subserved by so doing, and such work may be performed directly by the city by the employment of labor and purchase of material, or in any other manner in which the city council or city commission may deem proper in each particular case." § 3708, *supra*.

The special assessment commission is the tribunal created under the laws of this state to determine what parcels of land are benefited by the construction of the sewer (or other improvements), and to apportion the cost thereof according to the benefits (Comp. Laws 1913, §§ 3724, 3726). And any persons aggrieved by the findings of the commission may appeal to the city council, which latter body is required to hear and determine the objections presented by the party aggrieved. Comp. Laws 1913, §§ 3727, 3728.

In the case at bar it appears from the plaintiffs' complaint that the improvement contracted for has been fully completed, and that the assessment made by the special assessment commission for the cost of such construction was confirmed by the city commission almost six months before the present action was instituted. So far as the complaint shows they at no time objected to the construction of the sewer, or to any of the proceedings had before the special assessment commission or the city commission, but they stood by and permitted the work to be performed and the materials furnished. It is well settled that courts will not hold to as strict a construction in actions commenced after the work has been done, as in those wherein it is sought to enjoin the officials and contractors before the work has been performed in the execution of the contract. There is no charge that the city authorities acted fraudulently or that the omission or defect in the advertisement resulted in higher prices being paid for the work or that plaintiffs were in any other manner injured or prejudiced. It seems to me that plaintiffs must allege and prove that the alleged error in the advertisement resulted in some injury to them. The city commission had jurisdiction of the matter, and the initiatory proceedings were regular and valid, and the defect in the advertisement is not of such nature that it can be said as a matter of law that preju-

dice must have resulted therefrom. See *Koontz v. Centerville*, 161 Iowa, 627, 143 N. W. 490; *Clifton Land Co. v. Des Moines*, 144 Iowa, 625, 123 N. W. 340; *Re Lightner*, 145 Iowa, 95, 123 N. W. 749; *Re Johnson*, 103 N. Y. 260, 8 N. E. 399; *Carson v. Allegheny City*, 213 Pa. 537, 62 Atl. 1070.

Consequently, I do not believe that the allegations in plaintiffs' complaint with respect to the alleged defect in the advertisement state sufficient facts to entitle plaintiff to equitable relief.

It seems to me, also, that a party seeking equitable relief should be required to show that he has invoked and exhausted the remedies provided by the statute, or show valid reasons for failing to do so. I realize that a somewhat different rule was announced in the former opinion in this case, as well as in *Robertson Lumber Co. v. Grand Forks*, 27 N. D. 556, 147 N. W. 249. I do not care to discuss these decisions further than to say that I do not believe that the rule therein announced should be extended. In almost every conceivable transaction or proceeding, a party is required to present his objections at the earliest possible opportunity, and if he fails to do so, the objection will be deemed waived. It must be presumed that if there are any valid objections against an assessment or its confirmation, that such objections would be sustained if properly presented to the special assessment commission or to the city council on appeal.

GERTRUDE SKAAR v. E. A. EPPELAND.

(159 N. W. 707.)

Appeals — appellate court — judgments — correctness — presumptions — indulged in favor of.

1. An appellate court will indulge all reasonable presumptions in favor of the correctness of the judgment or order from which the appeal is taken.

New trial — motion for — time for hearing — noticed — judgment — prior to expiration of appeal time — final submission — determination of — after time for appeal has expired — finality of judgment suspended — jurisdiction — complete.

2. Where a motion for a new trial is duly noticed to be heard at a date

prior to the expiration of time for appeal from the judgment, but continued by consent of the parties, and finally submitted and determined after the time for appeal from the judgment has expired, the final character of the judgment is suspended by the pending proceedings, and the court has jurisdiction to determine the motion for a new trial even though the time for appeal from the judgment has expired.

New trial — granting — refusing — evidence — insufficiency of — ground — court — judicial discretion — decision — not disturbed — except for abuse.

3. The granting or denial of a new trial on the ground that the evidence is insufficient to sustain the verdict, or that excessive damages were awarded, is within the sound judicial discretion of the trial court, and its decision will not be disturbed except where an abuse thereof is clearly shown.

Opinion filed September 14, 1916.

Appeal from the District Court of Mountrail County, *Fisk, J.*

From an order granting a new trial, plaintiff appeals.

Affirmed.

P. D. Jones, T. M. Keogan, and E. R. Sinkler, for appellant.

The time for appeal having expired, the court had no jurisdiction to entertain the motion or grant the motion for a new trial. The action was no longer pending in the district court at the time of the motion for a new trial. New Practice Act, 1913, § 14; Code Civ. Proc. § 7346; *Bright v. Juhl*, 16 S. D. 440, 93 N. W. 648.

The court's jurisdiction over the action ceases as soon as the time for appeal has expired, and the action is no longer pending. *Kimball v. Palmerlee*, 29 Minn. 302, 13 N. W. 129; *Deering v. Johnson*, 33 Minn. 97, 22 N. W. 174; *Yerkes v. McHenry*, 6 Dak. 5, 50 N. W. 485; *Richardson v. Rogers*, 37 Minn. 461, 35 N. W. 270; *Pugh v. Reat*, 107 Ill. 440; *Ferger v. Wesler*, 35 Ind. 53; *Knox v. Clifford*, 41 Wis. 458; *Whitney v. Karner*, 44 Wis. 563; *McKnight v. Livingston*, 46 Wis. 356, 1 N. W. 14.

The time for appeal expires six months after notice of entry of judgment is given. After the expiration of such time, the action ceases to be pending. It was therefore not pending when the motion for a new trial was made. A court cannot assume jurisdiction over an action not pending. The legislature intended that there should

come a time when litigation in a given case would be at an end. *Wilson v. Kryger*, 26 N. D. 77, 51 L.R.A. (N.S.) 760, 143 N. W. 764.

Henry J. Linde and Francis J. Murphy (John E. Greene, of counsel), for respondent.

It is true that an appeal from a judgment must be taken within six months after notice of the entry of the judgment, but where a motion for a new trial is made within that time, and is argued and submitted, the mere fact that the court does not decide the motion until after the expiration of the six months' period does not deprive it of jurisdiction of the case, nor does it destroy the moving party's right of appeal. *King v. Hanson*, 13 N. D. 85, 99 N. W. 1085; Codes of 1899, §§ 5473, 5474; Comp. Laws 1913, § 7664.

"An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." Comp. Laws 1913, § 7956; *Cory v. Spencer*, 67 Kan. 648, 63 L.R.A. 275, 73 Pac. 920.

Jurisdiction of the district court to deal with one of its judgments is not at an end when the time for appeal has expired. Const. 103; Comp. Laws 1913, § 7349.

"The power to render judgment included the power to issue all proper processes to enforce its payment. The jurisdiction of the court over the controversy and over the parties, acquired in the primary case by service of process, continued until its judgment should be satisfied. This is a well-settled rule in respect to the jurisdiction of courts of record." *Phelps v. Mutual Reserve Fund Life Asso.* 61 L.R.A. 717, 50 C. C. A. 339, 112 Fed. 453; *Riggs v. Johnson County*, 6 Wall. 166, 18 L. ed. 768; *Covell v. Heyman*, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355; *Rio Grande R. Co. v. Gomila (Rio Grande R. Co. v. Vinet)* 132 U. S. 478, 33 L. ed. 400, 10 Sup. Ct. Rep. 155.

Where the district court has jurisdiction of the subject-matter of the action, all other objections may be waived, and they are waived when not offered or taken at the time the exercise of jurisdiction is first claimed. 11 Cyc. 676.

When a new trial is granted, the order of the court will be affirmed if, upon the whole record, it appears that the same is justified, and

the consideration of the order in the supreme court is not limited to the particular grounds mentioned in and upon which the order was made. *Bristol & S. Co. v. Skapple*, 17 N. D. 271, 115 N. W. 841; *Ross v. Robertson*, 12 N. D. 27, 94 N. W. 765; *Gooler v. Eidsness*, 18 N. D. 338, 121 N. W. 83; *Davis v. Jacobson*, 13 N. D. 430, 101 N. W. 314.

CHRISTIANSON, J. This is an appeal from an order granting defendant's motion for a new trial. Plaintiff sued to recover damages for certain personal injuries alleged to have been sustained at the hands of defendant, and was awarded a verdict in the sum of \$1,000.

No statement of case was settled, and there is nothing to show what proceedings were had at, or subsequent to, the trial, except as evidenced by the various papers contained in the record herein, to which we will refer later.

A transcript of the evidence adduced, and the proceedings had, upon the trial, certified to by the court stenographer, has been transmitted to this court, but such transcript has not been settled or certified by the trial judge as provided by § 7655, Comp. Laws 1913, and is not mentioned in the order granting a new trial or in the certificate signed by the trial judge identifying the different papers constituting the judgment roll in the action.

It appears from the record in this case, however, that judgment was entered, and notice of entry thereof served, on November 26, 1913; that notice of a motion for a new trial and several affidavits in support of such motion were served upon plaintiff's attorney on April 12, 1914; that said motion for a new trial was noticed to be heard at the city of Williston on April 23, 1914; that said motion subsequently came on for hearing, and the trial court entered an order granting a new trial, which order reads, in part, as follows: "The above-entitled action having come on for hearing upon a motion of the defendant for a new trial therein, and having been submitted to this court by the respective parties on or about the 3d day of June, 1914, upon written briefs and stipulations, and the matter not having been reached until this date by the court on account of having been engaged in the trial of jury cases since the submission of said motion, and the court, having duly considered the motion of the defendant, and the grounds thereof,

together with the briefs submitted by both parties, is of the opinion that a new trial should be granted."

(1) Appellant asserts that the order should be reversed for the reason that the motion for a new trial was heard and decided by the trial court more than six months after the service of notice of entry of judgment.

As already stated, it appears that notice of entry of judgment was served on November 26, 1913. The time for appeal from the judgment would therefore expire on May 26, 1914. The notice of motion for a new trial, served on April 12, 1914, fixing April 23, 1914, as the date for the hearing of such motion, was therefore served and the motion noticed to be heard within the six-month period. The record fails to show the reason for the delay in the hearing of the motion, but the recitals in the order show that the motion was "submitted to the court by the respective parties on or about the 3d day of June, 1914, upon written briefs and stipulations."

A party asserting error has the burden of proving it, and must present a record affirmatively showing such error. *Erickson v. Wiper*, 33 N. D. 193, 157 N. W. 602.

"It is a general rule of wide application that an appellate court will indulge all reasonable presumptions in favor of the correctness of the judgment, order, or decree from which the appeal was taken. In other words it will be presumed on appeal, in the absence of a contrary showing, that the trial court acted correctly and did not err. Indeed, error is never presumed on appeal, but must be affirmatively shown by the record; and the burden of so showing it is on the party alleging it, or, as sometimes stated, the burden of showing error affirmatively is upon appellant or plaintiff in error." 4 C. J. 731.

But "the presumptions which may be so indulged on appeal are limited to those which will sustain and support the order, judgment, or decree; presumptions which would result in a reversal will not be indulged, except on review of a ruling on a demurrer to the evidence or on a motion to dismiss, nonsuit, or direct a verdict on the ground of the insufficiency of the evidence, and even in that case the appellate court does not indulge in presumptions for the express purpose of reversing the judgment, order, or decree, but reviews the ruling on the theory that all inferences, presumptions, and intendments should

be indulged in favor of the sufficiency of the evidence to require its submission to the jury." 4 C. J. 733.

And "on a partial or incomplete record, the appellate court will presume any conceivable state of facts within the scope of the pleadings and not inconsistent with the record which will sustain and support the ruling or decision complained of; but it will not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent." 4 C. J. 736.

So it will be presumed that a statement of case was presented to the judge for settlement at the proper time; and, if it appears that the statement was not settled within the time provided, it will be presumed that the time was extended as provided by law, and that the statement was presented for settlement within such extended time. *Johnson v. Northern P. R. Co.* 1 N. D. 354, 48 N. W. 227; *Gade v. Collins*, 8 S. D. 323, 66 N. W. 466; *McDonald v. Beatty*, 9 N. D. 293, 83 N. W. 224; 4 C. J. 793.

So where a new trial is ordered it will be presumed (unless the contrary is shown) that the motion was properly and timely made; that there was good cause for any apparent delay in the presentation thereof; or that the time was extended by consent of the parties. *Churchill v. Flournoy*, 127 Cal. 355, 59 Pac. 791; 4 C. J. 783.

In the case at bar it affirmatively appears from the record that defendant regularly noticed a motion for a new trial to be heard on April 23, 1914. For some reason (which is not shown) the hearing on this motion was continued to, and apparently concluded on, June 3, 1914, at which time plaintiff's counsel appeared and submitted the motion on its merits, and without the slightest objection to the consideration thereof at that time. We must presume, therefore, not only that the plaintiff consented to a continuance of the hearing of such motion, but, if necessary to sustain the court's jurisdiction to make the order appealed from, we must even indulge the presumption that the hearing of the motion was continued until June 3, 1914, upon the plaintiff's request.

(2) Plaintiff's counsel contends, however, that the court was without jurisdiction to hear or decide the motion for a new trial even if the plaintiff consented thereto. This contention is based upon § 7966, Comp. Laws, which reads: "An action is deemed to be pending from

the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." This section was construed by this court in three recent decisions,—*Grove v. Morris*, 31 N. D. 8, 151 N. W. 779; *Higgins v. Rued*, 30 N. D. 551, 153 N. W. 389, and *Garbush v. Firey*, 33 N. D. 154, 156 N. W. 537. In these cases we held that where the notice of motion for a new trial was served more than six months after the date of notice of the entry of judgment, *i. e.*, after the time for appeal from the judgment had passed,—the district court was without authority to entertain such motion over the objections of the adverse party. In *Grove v. Morris* and *Higgins v. Rued*, specific objections were made to a consideration of the motion in the district court, upon the grounds that the time allowed by law in which to appeal from the judgment had expired; that the action was no longer pending, and that the court was without jurisdiction to entertain the motion. In *Garbush v. Firey*, the motion for a new trial was made and submitted nearly a year after notice of entry of judgment, and was made and submitted without notice to the opposing party, and he raised the objection at the earliest possible opportunity by motion to dismiss the appeal. In *Higgins v. Rued* and *Garbush v. Firey*, we affirmed the orders of the district court denying new trials.

It will be noticed that the controlling facts in all these cases were quite similar. In all of them the motion for a new trial was, in effect, noticed and presented after the time for appeal from the judgment had expired, and the party opposing the motion, at the earliest possible moment, made specific objection to a consideration thereof.

The facts in case at bar are radically different from the facts in the three cases just considered. In the case at bar the motion for a new trial was duly noticed to be heard before the time for appeal from the judgment had expired. The hearing was apparently postponed,—for what reason we do not know, but the record shows no objection thereto on the part of plaintiff, and we must assume that the postponement was with plaintiff's consent or at his request. Obviously, the facts in the case at bar distinguish it from the three decisions above referred to, and they are not controlling precedents in this case.

In fact, in *Garbush v. Firey*, we expressly disclaimed any intention of passing upon the question presented in this case. In a supplemental

opinion on a petition for rehearing in that case, we said: "Whether the court has authority to determine a motion for a new trial submitted within the six-month period, after the expiration thereof, or has authority to continue a motion noticed to be heard within such period, and hear and determine the same after the expiration of such period, or whether such authority can, in any event, be conferred by agreement or waiver after the expiration of the six-month period, are questions which do not arise in this case and upon which we express no opinion."

Plaintiff also cites and relies upon *Sargent v. Kindred*, 5 N. D. 472, 67 N. W. 826. That case involved an application to vacate a default judgment. The application was under the statute relative to such applications. See Comp. Laws 1913, § 7483. And this court held that under the language of the statute there construed, the district court was granted power to relieve a party from a judgment only within one year after notice thereof, and that, therefore, it was necessary that the order granting the relief be made within the year. No such limitations are found in the statute relative to new trials. The limitations there found are directed to the time within which the motion for a new trial must be made. See Comp. Laws 1913, § 7664. They are limitations upon the time within which a party may apply for a new trial. A party desiring to exercise the right to move for a new trial must do so within the time prescribed by law. The time limit fixed by the statute within which to move for a new trial is intended primarily for the benefit of the successful party. As said by this court in *Sargent v. Kindred*, supra: "The successful suitor is entitled to some protection. There should come a time when he may know that his judgment is secure against attacks." And as we said in *Garbush v. Firey*, supra: "There must be some end to litigation. Public policy demands that there be some point of time when a valid judgment, regularly entered, becomes final and unassailable. The legislature recognized this fact, and its intent, as declared by § 7966, Compiled Laws 1913, is that a judgment shall become final and conclusive when the time for appeal has expired, *and that no proceedings shall thereafter be instituted, over the objections of the adverse party, for a reversal of such judgment.*"

It does not follow, however, that the final character of the judgment may not be suspended by pending proceedings for a new trial, properly

instituted and noticed for hearing during the six-month period, but held in abeyance by action of the court or consent of the parties, and finally determined after the expiration of such period. Section 7966, Comp. Laws, must be construed in harmony with the statutory provisions relative to motions for a new trial.

It was the rule of the common law—and it has been adopted and adhered to with more or less consistency in those states where the functions of the court can be exercised only in term time—that after the expiration of the term the court loses control of its judgments rendered during that term; they become final, and the court no longer has the power to vacate, modify, or set them aside. Black, *Judgm.* 2d ed. § 306; *Bronson v. Schulten*, 104 U. S. 410, 26 L. ed. 797; *Martinson v. Marzolf*, 14 N. D. 301, 309, 103 N. W. 937. But “whatever abridges or suspends the final character of a judgment will save it from the operation of the rule under consideration. A motion to vacate a judgment, made at the same term at which the judgment was rendered, and continued to a subsequent term, may be allowed at such subsequent term. . . . Where a motion for a new trial is continued over the term, the proceedings are still in the breast of the judge, and he has jurisdiction to set aside the judgment for informality, and let the verdict stand.” Black, *Judgm.* 2d ed. § 310. By analogous reasoning we reach the conclusion that where a motion for a new trial is duly noticed to be heard within the six-month period, and final hearing thereon postponed by consent of the parties, or the delay of the court in deciding the motion, the final character of the judgment is suspended by the proceedings so pending. This is in harmony with the result reached by this court in *King v. Hanson*, 13 N. D. 85, 99 N. W. 1085, as that decision is analyzed in the supplemental opinion on petition for rehearing in *Garbush v. Firey*, *supra*.

(3) Appellant next contends that, even though the court had power to consider the motion for a new trial, no sufficient legal reason existed justifying the granting of a new trial.

In the memorandum filed by the trial judge (under § 7945, Comp. Laws) with the order granting a new trial, it is stated that a new trial was ordered on the grounds: (1) That the evidence was insufficient to justify the verdict; and, (2) that the jury, under influence of passion and prejudice, awarded excessive damages.

The granting or the denial of a new trial on the ground that the evidence is insufficient to sustain the verdict, or that the damages awarded are excessive, is within the sound judicial discretion of the trial court, and its decision will not be disturbed except where an abuse thereof is clearly shown. 4 C. J. 833, 835. See also *Blackorby v. Ginther*, 34 N. D. 248, 158 N. W. 354.

As we have already stated, plaintiff's counsel contends (and the record seems to sustain the contention) that a statement of case has at no time been settled herein. If this is correct, we have no means of determining the sufficiency of the evidence. But while not properly a part of the record on this appeal, we have examined the certified transcript of the evidence, and, if this transcript be considered, we are by no means justified in saying that the trial court abused its discretion in ordering a new trial on the ground of insufficiency of the evidence to sustain the verdict.

Order affirmed.

JOHN SKAAR v. E. A. EPELAND.

(159 N. W. 710.)

This case is governed by the decision rendered in *Skaar v. Eppeland*, ante, 116.

Opinion filed September 14, 1916.

Appeal from the District Court of Mountrail County, *Fisk*, J.
From an order granting a new trial, plaintiff appeals.

Affirmed.

P. D. Jones and *T. M. Keogan* and *E. R. Sinkler*, for appellant.

Henry J. Linde and *Francis J. Murphy* (*John E. Greene*, of counsel), for respondent.

CHRISTIANSON, J. This case was submitted together with *Skaar v. Eppeland*, ante, 116, 159 N. W. 707. Plaintiff sued to recover damages for the loss of service and consortium of his wife Gertrude Skaar, by reason of alleged injuries sustained at the hands of the defendant.

The cause of action is based upon the same alleged assault involved in *Skaar v. Eppeland*, supra. Plaintiff recovered a verdict, and a new trial was ordered, under the same circumstances and for the same reasons involved in the other case. The same questions are presented on appeal in this case as those presented in the other case, and, therefore, this case is governed by the decision rendered in *Skaar v. Eppeland*, supra.

The order granting a new trial must therefore be affirmed.

N. A. PETRIE, Respondent, v. JOHN WYMAN et al., Defendants,
and Argusville Farmers' Elevator Company, a Corporation, and
S. A. Payne, Garnishees—Appellants.

(159 N. W. 616.)

Garnishee — liability — measure of — defendant — relation to — position of plaintiff.

1. A garnishee's liability is measured by his responsibility and relation to the defendant; and a plaintiff cannot, by garnishment, place himself in a superior position as regards a recovery than is occupied by the defendant.

Creditor — garnishee — personal property — trust agreement — covered by — execution of — prior to garnishment — lien — not superior to trustee's — position of creditor.

2. Where a creditor garnishes personal property covered by an unrecorded trust agreement executed and delivered prior to the service of the garnishment process, he does not by such garnishment acquire a lien or interest superior to that of the trustee and beneficiary in the trust agreement, under the statute (Comp. Laws 1913, § 6758) declaring a mortgage of personal property to be void as to creditors unless filed for record in the office of the register of deeds of the county where the property mortgaged or any part thereof is situated, where the debt for which the garnishment action is maintained existed before the execution and delivery of the trust agreement, and the creditor has not altered his position to his detriment since the trust agreement was executed.

Possession of goods — retention of — presumptively fraudulent — evidence — jury — question for — change of possession.

3. Under the provisions of the statute (Comp. Laws 1913, § 7221) the retention of possession of goods or chattels by a vendor renders the transfer

presumptively fraudulent; but where there is any substantial evidence tending to show an actual and continued change of possession, it becomes a question of fact for the jury to determine whether there has been such change of possession.

Evidence — property — control of — trust agreement — subsequent to.

4. Evidence examined, and *held* that it fails to establish plaintiff's contention that defendant exercised control over and sold part of the personal property covered by the trust agreement subsequent to the execution and delivery of such agreement.

Trust agreement — reservation to grantor — or family — conveyance — inconsistent with — fraud — evidence of — voidable by creditors — general rule.

5. A reservation (in a trust agreement) to the grantor or his family, of an advantage inconsistent with the avowed purpose of the conveyance, is ordinarily deemed to be evidence of fraud, rendering the transfer voidable at the instance of nonassenting creditors; but where such reservation is consistent with, or results from, the nature and character of the transfer, it will not, as a general rule, be deemed the reservation of a benefit rendering the transfer fraudulent.

Evidence — introduction of — objection to — specific grounds — confined to such — all other deemed waived.

6. An objection to the introduction of evidence upon one or more specific grounds does not go to other grounds not stated, and is a waiver of all other grounds of objection not stated.

Opinion filed September 14, 1916.

Appeal from the District Court of Cass County, *Pollock, J.*

From judgments rendered against them as garnishees, and orders denying their motions for judgment notwithstanding the verdict or for a new trial, Payne & Argusville Farmers' Elevator Company appeal. Reversed.

Barnett & Richardson, for appellants.

Plaintiff is not entitled to judgment against the garnishee Payne, because no liability existed between Payne and Wyman by reason of the provisions of the lease.

A plaintiff in garnishment proceedings stands in no better position than the defendant does, with respect to the indebtedness sought to be reached by the process of garnishment, and such process will not hold anything which is not legally and equitably the property of the principal defendant. Therefore, an assignment by defendant of the

claim due him from the garnishee will take precedence over a garnishment, provided the assignment was in good faith and for a valuable consideration. 14 Am. & Eng. Enc. Law, 857; 20 Cyc. 983; Bambrick v. Bambrick Bros. Constr. Co. 152 Mo. App. 69, 132 S. W. 322; Farley v. Colver, 113 Md. 379, 77 Atl. 591; What Cheer Sav. Bank v. Mowrey, 149 Iowa, 114, 128 N. W. 7; Edward Thompson Co. v. Durand, 124 La. 381, 50 So. 407; Mansfield v. Stevens, 31 Minn. 40, 16 N. W. 455; Singer Sewing Mach. Co. v. Southern Grocery Co. 2 Ga. App. 545, 59 S. E. 473; Holmes v. Pope, 1 Ga. App. 338, 58 S. E. 281; Rushton v. Davis, 127 Ala. 279, 28 So. 477; St. Louis v. Regenfuss, 28 Wis. 144; Bradley v. Byerley, 3 Kan. App. 357, 42 Pac. 930; Dole v. Farwell, 72 N. H. 183, 55 Atl. 553; Johnson v. Brant, 38 Kan. 754, 17 Pac. 794; Netter v. Stoeckle, 4 Penn. (Del.) 345, 56 Atl. 604; Edney v. Willis, 23 Neb. 56, 36 N. W. 300; Chicago, B. & Q. R. Co. v. Van Cleave, 52 Neb. 67, 71 N. W. 971; Roby v. Labuzan, 21 Ala. 60, 56 Am. Dec. 237; Smith v. Marker, 85 C. C. A. 372, 154 Fed. 838; Grimwood Co. v. Capitol Hill Bldg. & Constr. Co. 28 R. I. 32, 65 Atl. 304; Feore v. Mississippi Transp. Co. 161 Ala. 567, 49 So. 871; J. J. Smith Lumber Co. v. Scott County Garbage Reducing & Fuel Co. 149 Iowa, 272, 30 L.R.A.(N.S.) 1184, 128 N. W. 389; Peoples' Sav. Bank v. Hoppe, 132 Mo. App. 449, 111 S. W. 1190; Clay Lumber Co. v. Hart's Branch Coal Co. 174 Mich. 613, 140 N. W. 912; Peters v. Snavelly-Ashton, 144 Iowa, 147, 120 N. W. 1048, 122 N. W. 836; Bedford v. Kissick, 8 S. D. 586, 67 N. W. 609; Grand Lodge, U. B. F. v. Harrison, 5 Ala. App. 373, 59 So. 307; Barkley v. Kerfoot, 77 Wash. 556, 137 Pac. 1046; Field v. Samis, 12 N. M. 36, 73 Pac. 617.

The transaction here was simply the giving of security for the furnishing of a supersedeas bond. It was an absolute assignment by defendant of his claim against this garnishee, and therefore garnishing creditors whose process was served after the assignment could obtain no enforceable rights against the garnishee.

The defendants themselves had nothing coming to them from the garnishee. They could not have obtained a judgment against the garnishee. The plaintiff occupies no better position. 14 Am. & Eng. Enc. Law, 857, 858; Roberts v. First Nat. Bank, 8 N. D. 480, 79 N. W.

1049; *Bambrick v. Bambrick Bros. Constr. Co.* 152 Mo. App. 69, 132 S. W. 322; *Sintes v. Commerford*, 112 La. 706, 36 So. 656; *Williams v. Pomeroy*, 27 Minn. 85, 6 N. W. 445; *Walling v. Miller*, 15 Cal. 38, 7 Mor. Min. Rep. 165; *Caldwell v. Coates*, 78 Pa. 312; *Case v. Ingersoll*, 7 Kan. 367; *Third Nat. Bank v. Atlantic City*, 126 Fed. 413; 20 Cyc. 992, 993, 1012-1026; *What Cheer Sav. Bank v. Mowrey*, 149 Iowa, 114, 128 N. W. 7; *Welch v. Renfro*, 42 Tex. Civ. App. 460, 94 S. W. 107; *Mason v. Saunders*, 89 Kan. 300, 131 Pac. 562; *Holmes v. Pope*, 1 Ga. App. 338, 58 S. E. 281; *St. Louis v. Regenfuss*, 28 Wis. 144; *Hall v. Page*, 4 Ga. 428, 48 Am. Dec. 235; *Roby v. Labuzan*, 21 Ala. 60, 56 Am. Dec. 237; *McLaughlin v. Swann*, 18 How. 217, 15 L. ed. 357; *Cavanaugh v. Merrimac Hat Co.* 213 Mass. 384, 100 N. E. 662; *Younkin v. Collier*, 47 Fed. 571; *Boutwell v. McClure*, 33 Vt. 127; *Crudington v. Hogan*, 105 Tenn. 448, 58 S. W. 642.

The general rule is that only legal, not equitable, rights, are reached by garnishment process. 14 Am. & Eng. Enc. Law, 858; *Howard v. Porter*, 99 Ga. 649, 27 S. E. 725; *Smith v. Worley*, 10 Ga. App. 280, 73 S. E. 428; *What Cheer Sav. Bank v. Mowrey*, 149 Iowa, 114, 128 N. W. 7; *Rushton v. Davis*, 127 Ala. 279, 28 So. 477; *Sintes v. Commerford*, 112 La. 706, 36 So. 656; *Third Nat. Bank v. Atlantic City*, 126 Fed. 413.

The rule is that the reservation of a surplus under an assignment or instrument in trust does not invalidate the transfer. 20 Cyc. 561.

Declarations of an assignor made after an assignment are inadmissible against the assignee. *Reinecke v. Gruner*, 111 Iowa, 731, 82 N. W. 900.

The validity or invalidity of the clause in the assignment as to the surplus can have no effect on the remaining valid provisions thereof. *McCormick Harvester Mach. Co. v. Caldwell*, 15 N. D. 137, 106 N. W. 122.

The question of notice of the assignment is immaterial. Wyman had the right, without notice to any person, to give the trust company security for furnishing the supersedeas bond. 14 Am. & Eng. Enc. Law, 861; *Williams v. Pomeroy*, 27 Minn. 85, 6 N. W. 445; *White v. Fernald-Woodward Co.* 75 N. H. 504, 77 Atl. 401; *Corning v. Records*, 69 N. H. 390, 76 Am. St. Rep. 178, 46 Atl. 462; *Ama-*

35 N. D.—9.

rillo Nat. Bank v. Panhandle Teleg. & Teleph. Co. — Tex. Civ. App. —, 169 S. W. 1091; Walling v. Miller, 15 Cal. 38, 7 Mor. Min. Rep. 165; Crudington v. Hogan, 105 Tenn. 448, 58 S. W. 642; 20 Cyc. 553-555.

The clause in the assignment as to the surplus is wholly immaterial, for the further reason that there is not one particle of testimony in the record that there was any surplus. Caldwell v. Coates, 78 Pa. 312, and cases cited; Howard v. Porter, 99 Ga. 649, 27 S. E. 725; Smith v. Worley, 10 Ga. App. 280, 73 S. E. 428.

The holder of such surplus, if any, must be made a party before the rights of such third party can be affected. 20 Cyc. 1101; Edward Thompson Co. v. Durand, 124 La. 381, 50 So. 407; Mansfield v. Stevens, 31 Minn. 40, 16 N. W. 455; Brown v. Pillow, 98 C. C. A. 579, 174 Fed. 967; Corning v. Records, 69 N. H. 390, 76 Am. St. Rep. 178, 46 Atl. 462.

No presumption of liability on the part of a garnishee can be indulged. 20 Cyc. 1097, 1098; Bambrick v. Bambrick Bros. Constr. Co. 152 Mo. App. 69, 132 S. W. 322; Edward Thompson Co. v. Durand, 124 La. 381, 50 So. 407; Mansfield v. Stevens, 31 Minn. 40, 16 N. W. 455; Field v. Malone, 102 Ind. 251, 1 N. E. 507; Reinecke v. Gruner, 111 Iowa, 731, 82 N. W. 900; Payne v. Chicago, R. I. & P. R. Co. 170 Ill. 607, 48 N. E. 1053; Curtis v. Parker, 136 Ala. 217, 33 So. 935; Caldwell v. Coates, 78 Pa. 312.

A. C. Lacy and John Carmody, for respondent.

A cause cannot be tried upon one theory in the lower court and upon an entirely new theory in the supreme court.

In the lower court, appellants contended that the assignment was a sale. Here for the first time they say it was only as security. Lynn v. Seby, 29 N. D. 420, L.R.A.1916E, 788, 151 N. W. 31; Rock v. Collins, 99 Wis. 630, 67 Am. St. Rep. 885, 75 N. W. 426.

Every transfer of property or charge thereon, every obligation incurred, and every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands, is void as against all creditors of the debtor and their successors in interest. Comp. Laws 1913, § 7220.

It is true that generally the actions of people are presumed to be fair and without intent to defraud others, yet transactions between

relatives will be very closely scrutinized to see that no wrong is done. *Krause v. Krause*, 30 N. D. 54, 151 N. W. 991.

Where it is exclusively within the power of a party to produce evidence fully explaining a given transaction involved, and he purposely withholds the same or fails to produce it, a strong suspicion is raised as to the good faith of the transaction. *Whart. Ev.* 1266, 1269; *Helms v. Green*, 105 N. C. 251, 18 Am. St. Rep. 901, 11 S. E. 470; *Daisy Roller Mills v. Ward*, 6 N. D. 317, 70 N. W. 271.

If a garnishee fails to avail himself of the statutory remedies provided, he alone must suffer. *Paulson v. Ward*, 4 N. D. 100, 58 N. W. 792.

A garnishee who, before answer, has notice that the defendant in the action has assigned the debt to another before notice of the garnishment was served, must state that fact in his answer, to be protected from an action by the assignee of the debt. *Coleman v. Scott*, 27 Neb. 77, 42 N. W. 896; *Copeland v. Manton*, 22 Ohio St. 404; *Maxwell*, Justice Pr. (Neb.) 5th ed. 341, 342; *Drake*, *Attachm.* § 527; *Wakefield v. Martin*, 3 Mass. 558; *Dix v. Cobb*, 4 Mass. 508; *Warren v. Copelin*, 4 Met. 598; *Littlefield v. Smith*, 17 Me. 327; *Winch v. Keeley*, 1 T. R. 619, 99 Eng. Reprint, 1284; *Walling v. Miller*, 15 Cal. 38, 7 Mor. Min. Rep. 165; *Smith, T. & Co. v. Clarke*, 9 Iowa, 241; *Nesmith v. Drum*, 8 Watts & S. 9, 42 Am. Dec. 260; *Wilson v. Davisson*, 5 Munf. 178; *Tazewell v. Barrett*, 4 Hen. & M. 259; *Anderson v. De Soer*, 6 Gratt. 364.

All defenses not made in the pleadings are considered as waived, especially such as are connected with the facts in the case. *Stewart v. Preston*, 1 Fla. 11, 44 Am. Dec. 621; *Nicholson v. Golden*, 27 Mo. App. 132; *Wright v. Fire Ins. Co.* 12 Mont. 474, 19 L.R.A. 211, 31 Pac. 87; *Ex parte Bergman*, 18 Nev. 331, 4 Pac. 209.

All findings must be supported by the evidence, and a judgment based upon findings not so supported cannot be sustained. *Moren-hout v. Barron*, 42 Cal. 605; *Devoe v. Devoe*, 51 Cal. 543; *Potomac Mfg. Co. v. Evans*, 84 Va. 717, 6 S. E. 2.

No liberality of construction will excuse the failure to plead a material fact. *McCormick Harvesting Mach. Co. v. Rae*, 9 N. D. 482, 84 N. W. 346.

Evidence which is pertinent to the issues on trial cannot be con-

sidered for other or different purposes. *McClory v. Ricks*, 11 N. D. 42, 88 N. W. 1043; *Harkins v. Cooley*, 5 S. D. 227, 58 N. W. 560.

Where a garnishee in his answer denies indebtedness to defendant, he cannot rely on an allegation of alleged equitable assignment of his own indebtedness to a third person as a defense. *First Baptist Church v. Hyde*, 40 Ill. 150; *Large v. Moore*, 17 Iowa, 258; *Rock Island Lumber & Mfg. Co. v. Fourth Nat. Bank*, 63 Kan. 768, 66 Pac. 1024; *Muse v. Lehman*, 30 Kan. 514, 1 Pac. 804; *Daggett v. Flanagan*, 78 Ind. 253; *Leahey v. Dugdale*, 41 Mo. 517; *Woodlawn v. Purvis*, 108 Ala. 511, 18 So. 531; 9 Decen. Dig. title, Garnishment, § 132; 24 Century Dig. 261; *Kimbrough v. Davis*, 34 Ala. 583; *Cox v. Cronan*, 82 Conn. 175, 135 Am. St. Rep. 268, 72 Atl. 927; *Wallace v. Estill County Deposit Bank*, — Ky. —, 116 S. W. 351.

A judge may, upon his own motion, exclude evidence which he deems irrelevant; he is not bound, although the opposite party does not object, to sit and hear testimony having no legal bearing on the issues. *Cooper v. Barber*, 24 Wend. 105; *Hamilton v. New York C. R. Co.* 51 N. Y. 100; *Skillman v. Quick*, 4 N. J. L. 102; *Price v. St. Louis, K. C. & N. R. Co.* 72 Mo. 414, 4 Am. Neg. Cas. 508; *Corning v. Corning*, 6 N. Y. 97.

Even though incompetent evidence on the part of the plaintiff was admitted, if on the whole record the plaintiff was entitled to a directed verdict, then the admission of such evidence would not be ground for reversal. *Hillsboro Nat. Bank v. Hyde*, 7 N. D. 400, 75 N. W. 781.

CHRISTIANSON, J. Plaintiff instituted the main action herein for the purpose of recovering from the defendant John Wyman, the full amount due upon a certain promissory note in the sum of \$5,000, dated October 18, 1910, and payable to the order of one Emma C. Schinzer on the 1st day of August, 1911, and which note, it is alleged, was indorsed and transferred to the plaintiff herein. The summons and complaint in the main action were served upon the defendant on July 30, 1913.

On August 29, 1913, the plaintiff instituted a garnishment action, ancillary to said main action, against the following-named garnishees: Argusville Farmers' Elevator Company, Anchor Grain Company, S. A.

Payne, William Veitch, John Wyman Farm Land & Loan Company, and the First National Bank of Fargo. All the garnishees served and filed affidavits in form as prescribed by § 7574, Comp. Laws 1913, denying all liability. The affidavit in behalf of all garnishees (except the First National Bank of Fargo), was verified by E. T. Conmy as their agent. The plaintiff elected to take issue on such affidavits, and the issue thereby joined was brought on for trial before a jury, in one joint action, and resulted in a dismissal of the garnishment action against all the garnishees, with the exception of the Argusville Farmers' Elevator Company, and S. A. Payne, against whom the trial court directed verdicts in plaintiff's favor, and these two last-named garnishees appeal from the judgments rendered against them, and the orders denying their motions for judgment notwithstanding the verdict or for a new trial.

By stipulation the cases have been consolidated, and have been briefed and argued as one appeal.

The following facts are undisputed, or too conclusively proved, to be subject to doubt:—

The defendant John Wyman is the president of the John Wyman Farm Land & Loan Company. Wyman, individually, was the owner of the E.½ Sec. 12, Twp. 141, range 50, in Cass county, having acquired title thereto by a warranty deed executed and delivered to him by one Emma C. Schinzer, on the 12th day of June, 1911. Subsequently, said Emma C. Schinzer brought an action to have this warranty deed canceled on the alleged ground that it was obtained from her by means of false and fraudulent representations. In the spring of 1913, Wyman leased the northeast quarter to the garnishee Payne, and the southeast quarter to one Veitch (one of the garnishees against whom the proceedings were dismissed). The leases, however, were executed by the John Wyman Farm Land & Loan Company, by John Wyman, as its president, and the John Wyman Farm Land & Loan Company is described in both leases as the owner of the premises. Under the terms of the leases the tenant received one half of the crops produced, and the landlord one half.

The action of Schinzer v. Wyman was brought on for trial, and resulted in the rendition of a judgment in the district court of Cass county on July 24, 1913, in favor of Emma C. Schinzer, for a can-

celation of the deed, and for damages aggregating about \$14,000. Wyman desired to appeal from such judgment, and, in order to do so and stay proceedings pending appeal, it was necessary for him to furnish a supersedeas bond in the penal sum of \$16,000. He thereupon entered into negotiations with the Northern Trust Company and George H. Hollister, its president, for the purpose of obtaining such bond, with the result that the Northern Trust Company agreed to furnish, and become surety upon, such bond, provided Wyman, in some adequate manner, would secure or indemnify it against loss by reason of the risk thus assumed.

As a result of the negotiations, the Northern Trust Company became surety on such bond, the appeal was perfected, and resulted in a reversal of the judgment. (See *Schinzer v. Wyman*, 27 N. D. 489, 146 N. W. 898.) And in order to indemnify the Northern Trust Company against loss by reason of the risk assumed, Annie Wyman (defendant's wife) and the defendant John Wyman executed and delivered to the Northern Trust Company the following instrument:—

Trust agreement. This agreement made and entered into this 22d day of August, 1913, by and between Annie Wyman and John Wyman, her husband, parties of the first part, the Northern Trust Company, a corporation, party of the second part, and George H. Hollister, party of the third part, Witnesseth,

Whereas, the said John Wyman is defendant in a certain suit now pending in the district court of Cass county, third judicial district of the state of North Dakota, wherein Emma C. Schinzer is plaintiff, and judgment has been rendered in said action against said John Wyman, and the said Annie Wyman has requested the Northern Trust Company to execute as surety for said John Wyman, undertaking on appeal from said judgment to the supreme court of the state of North Dakota, in the penal sum of sixteen thousand (\$16,000) dollars, and said Annie Wyman and John Wyman, her husband, have executed and delivered to said the Northern Trust Company an application for said surety bond, containing agreement to indemnify said the Northern Trust Company from any loss thereon, and

Whereas, in addition to such application and indemnity agreement, said the Northern Trust Company has requested, as a condition to its accepting said application and executing said surety bond, that

the conditions of this agreement should be made and complied with by the said Annie Wyman and John Wyman, her husband,

Now therefore, This agreement witnesseth that, in consideration of the premises and the execution of said surety bond by said the Northern Trust Company, the parties of the first part will convey to George H. Hollister, party of the third part, all of sections thirty-three (33) and twenty-eight (28) in township one hundred forty-five (145) north of range forty-nine (49) west, of the fifth (5th) principal meridian, situated in Traill county, North Dakota, together with one half of all crops now growing or standing upon said premises, to be held by the said George H. Hollister in trust for the following purposes, to wit:

First: To have possession of said premises and of the crops now growing or standing thereon or to be hereafter grown thereon, and to harvest and sell the same, the net proceeds thereof to be deposited in the name of said George H. Hollister, trustee in The Northern Trust Company, and used and applied as follows: (a) To the payment of the expenses of raising, harvesting, and marketing said crops; (b) to the payment of principal and interest of liens and encumbrances upon said premises and crops; (c) to the payment of taxes upon said property; and (d) the balance to be held and retained by said George H. Hollister for the purposes hereinafter provided.

Second: To hold the title and possession of said premises and upon, and, in the event of the payment by said the Northern Trust Company of any amount under or by reason of said surety bond, to immediately, and upon demand made by the said the Northern Trust Company, and without the necessity of any consent or action by the parties of the first part, to sell said premises for such price and upon such terms and conditions as in his judgment shall be advisable, and to convey the same to the purchaser in fee simple.

Third: To sell and convey said premises at any time prior to the payment of any liability by said the Northern Trust Company under said surety bond, upon the consent of both the parties of the first part, and the party of the second part.

Fourth: And it is mutually understood and agreed that the proceeds of any sale of said premises shall be deposited by the said George H. Hollister in his name as trustee in the Northern Trust Company, and paid and applied as follows: (a) In the payment of

the principal and interest of the liens and encumbrances upon said premises; (b) in the payment of taxes or liens upon said premises; (c) in payment of expenses incurred by the said the Northern Trust Company or the said George H. Hollister in performance of said trust; and (d) the balance of such proceeds and also the balance of the proceeds of sale of all crops grown upon said premises as hereinbefore mentioned to be paid to the Northern Trust Company in satisfaction of any amount it shall pay under or by reason of said surety bond; and in case of any surplus or in the event said judgment shall be in all things reversed, and no liability shall exist upon said bond, then, and upon the happening of such event, such balance of said proceeds shall be paid by the said George H. Hollister to the said Annie Wyman.

It is also mutually agreed and understood that the crops raised on the east half (E.½) of section twelve (12) township one hundred forty-one (141) range fifty (50), or the interest of said parties of the first part, shall be disposed of and the proceeds deposited in the name of the party of the third part, in the Northern Trust Company, such money to be retained by him and applied as hereinbefore provided.

In witness whereof, the parties hereto have hereunto set their hands the day and year first above written.

Annie Wyman,
John Wyman,
The Northern Trust Company,

(Seal)

By Geo. H. Hollister,

Geo. H. Hollister,

A Corporation,

Its President.

Trustee.

Attest: P. W. Clemens, Secretary.

This agreement was duly acknowledged on August 22, 1913, by all parties, the acknowledgment of Annie and John Wyman being taken before E. T. Conmy, notary public.

The lands first described in this agreement belonged to Annie Wyman, and the lands described in the last paragraph therein are the lands involved in this action. This agreement was executed and delivered

on August 22, 1913, or one week before the commencement of the garnishment action.

Under the terms of the lease, Payne was required to deliver the landlord's share of the grain at an elevator in Argusville.

The undisputed evidence shows that at the time the garnishment summons was served, the grain had not been threshed, but it was threshed a day or two afterwards, and Payne hauled from the threshing machine and delivered the landlord's share, consisting of about 354 bushels of wheat, 407 bushels of barley, and 481 bushels of oats, at the Argusville Farmers' Elevator Company's Elevator at Argusville, North Dakota, in accordance with the stipulations in the lease. He gave the elevator company no directions in regard to the name of the owner, but, the evidence in so far as it bears upon this question at all tends to show that the storage tickets were issued to the Northern Trust Company. It is undisputed that this grain was delivered at the elevator, subsequent to the service of the garnishment summons upon Payne.

A man named Pinkham was present at the time the grain was threshed, and assisted, to some extent, in making a proper division thereof.

The testimony relative to the employment and services of Pinkham is as follows:

Payne says:

I don't know who he was working for; he kept track of the loads; we had on just as much on one load as on the other, and one took one load and the other the other. He said he was looking after that crop, but didn't say who sent him.

Wyman testifies: I sent Pinkham out there.

Q. He was in the employ of the John Wyman Farm Land & Loan Company at that time?

A. Yes, sir.

Q. How did you tell him to deposit the grain in the elevator, in whose name did you tell him? . . .

A. I told Pinkham that the Northern Trust Company had a mortgage on the grain, and that they authorized me and told me to go and handle it myself so they didn't need to send anybody out and

create any special expenses, and they trusted me to handle it and turn it into the elevator to their account.

Q. In their name?

A. Yes.

It is undisputed that all of the landlord's share of the grain grown by Payne was afterward sold and the entire proceeds therefor, transmitted to and received by George H. Hollister, and expended by him in accordance with the stipulations of the trust agreement.

The tenant Veitch raised 600 bushels of oats and 1,900 bushels of barley. The oats were governed by the provisions of the lease, and one half thereof belonged to the landlord. But the barley was raised under an arrangement whereby Veitch was to be paid for his labor, and the crop belonged to the landlord. At the time of the threshing, Veitch hauled and delivered the barley at the Argusville Farmers' Elevator Company's elevator, but placed the oats in a granary on the farm. Veitch, subsequently, and before the commencement of the garnishment action, purchased the oats.

The only evidence bearing upon this purchase is the testimony of Veitch, which is as follows:

Q. How many bushels of grain did you raise on those premises during that year?

A. Just what oat ground that I had in.

Q. Yes.

A. It was about 600 bushels and a little over by weight.

Q. Six hundred bushels of what?

A. Of oats.

Q. And what else?

A. Well, then I worked the balance of the quarter by the acre.

. . . I worked by the acre for him; done the work for cash.

Q. He was to pay you for it?

A. Yes.

Q. But that didn't affect this—that wasn't in regard to this 36 acres was it?

A. No.

Q. This 36 acres you had on shares?

A. Yes.

Q. Now, you say there were 600 bushels of oats raised during the season of 1912?

A. Yes.

Q. How many of barley?

A. I think about 1,900 bushels of barley. . . .

Examination by the court:

Q. Let me understand your testimony. Did you say that when the garnishee was served you had it all hauled?

A. All of the barley, and we finished up the oats when the garnishee was served.

Examination by Mr. Lacy:

Q. You didn't haul the oats in?

A. No.

Q. But you had hauled the barley?

A. Had hauled the barley." . . .

Q. You hauled all of this 600 bushels yourself?

A. The oats I put in the granary.

Q. In the granary on the farm?

A. Yes.

Q. You didn't haul the oats at all?

A. No; the oats, I bought them from Wyman.

Q. You bought them afterwards?

A. *No; when I first started to thresh on the Tolson place eight or ten days before that.*

Q. You had bought these oats, you say?

A. Yes.

Q. Had you paid him for them?

A. Well, we took this work out; I was to take this work out.

Q. This barley you say you had hauled?

A. I had hauled it.

Q. You hadn't any arrangement whereby you were to get a part of the barley?

A. No.

Examination by the court:

Q. What do you mean by that "I was to take this work out?"

A. I plowed that land and was to have \$1.75 an acre for plowing

it, and I seeded it and double harrowed it and harvested it and furnished the twine and hauled it to market.

Q. And those oats were to be paid for by the work?

A. Yes.

. . . We finished on the barley and went right at the threshing of the oats, and was through with the oats when the garnishee was served.

Q. This agreement between you and Wyman, or between you and the land company as to your keeping these oats for your services, was made before the service of the garnishee summons on the 29th of August?

A. Yes; about a week before.

It is conceded that the 1,900 bushels of barley had been delivered to, and was in the possession of, the Argusville Farmers' Elevator Company, at the time the garnishment summons was served upon it, and the verdict against the elevator company was for the value of such barley.

It is undisputed that the proceeds of all the grain delivered at the elevator by both Payne and Veitch were delivered to and received by Geo. H. Hollister under the trust agreement.

The uncontradicted testimony further shows that the proceeds received by Hollister amounted to \$1,549.54; that the moneys so received and credited by Hollister were paid out on different items, at different times, under the trust agreement, for interest, taxes, and seed. Hollister testified that he did not keep the items of expenditure made under the trust agreement separate with reference to the different descriptions of the lands set forth in the trust agreement, but testified that he paid out \$825 interest on the two sections mentioned in the trust agreement, and in addition thereto \$1,800 more, generally, as interest on the land set forth in the trust agreement.

There is no testimony whatever in the record with reference to the total amount of moneys received by Hollister under the trust agreement; the only testimony as to receipts being that of Hollister, who testifies, as above noted, to an aggregate of \$1,549.54.

There is no testimony tending to establish the fact as to what the total expenditures under the trust agreement were, the only testimony

in that connection being Hollister's testimony that expenditures aggregating \$2,625 were made.

There is no testimony tending to establish the fact that there was any surplus whatever paid back to either Mr. or Mrs. Wyman, or that any such surplus existed in fact. So far as the testimony goes, it shows that the disbursements exceeded the receipts in an amount of approximately \$1,000 or the difference between \$1,549.54 receipts, and \$2,625 disbursements.

At the close of the testimony, plaintiff dismissed his action against all garnishees, except Payne and Argusville Farmers' Elevator Company, and moved, for directed verdicts against the two last-named garnishees.

While this motion was pending, a colloquy, of which the following is a part, took place between the court and counsel:

The Court: What question of fact is there to go to the jury in this case?

Mr. Lacy: I don't think that there is any, your Honor.

The Court: Do you see anything Mr. Barnett?

Mr. Barnett: It seems to me that there is quite a question of fact as to whether these men had anything belonging to John Wyman or not.

The Court: There is no dispute here as to what was done and what they had, and it would be a question of law it would seem to me as to what would be the result of their acts. I do not know really what question I would submit to the jury as being a disputed question of fact. There are some legal phases of this question that I do not feel quite ready to answer just now, and I would like to look them up; if there is any disputed questions of fact, of course, we ought to have them settled, but there is no question as to the amount of grain; there is no dispute as to when the grain was hauled to the elevator; then the only question that would remain would be whether this agreement coming in as it did would have the legal result of releasing these garnishees. Now, there is no question but what all this property went into the hands of the Northern Trust Company; the proof is clear on that. These men hauled this grain to the elevator, and the grain was sold or shipped, and the proceeds were paid over to the Northern Trust Company. That is as clear as a bell. . . .

Mr. Carmody: . . . It seems to me, your Honor, that the whole case depends upon the contract or trust agreement between the Northern Trust Company and John Wyman and his wife, and that is the only question that is in the case, and that is a question of law for the court; that is the way it strikes me and that is my view of it, and that is why I made a motion for a directed verdict. . . .

The Court: (After making some computations). That leaves it, as I see it, no question for this jury at all. Now, unless there is a motion made here which will allow me to take the case under advisement I will have to instruct the jury one way or the other and then take it up later. You may use your pleasure about that, gentlemen. I want to say with reference to that trust agreement that I am not prepared at this time to answer that question. . . . Under the present state of the record I shall have to instruct the jury to find for the plaintiff and as against the defendant the Argusville Farmers' Elevator Company in the sum of \$874 and interest at 7 per cent since September 1, 1913; as against S. A. Payne for the sum of \$596.49 and interest at 7 per cent from and since September 1, 1913; and in so doing I want it distinctly understood that on the question of the Hollister agreement, which I take to be the pivotal question in this case, I am passing on it *pro forma*. . . . In other words, this simply brings it down to the legal questions involved in the case. There is no other question of fact it seems to me to go to the jury, and if there was a motion made here on the other side, then we could, at the proper time, settle this matter by a motion for judgment notwithstanding the verdict; but counsel does not apparently desire to make such a motion, and it is up to them, of course.

Mr. Barnett: In view of what the court says I will make that motion now at the close of the whole case, and we move for a directed verdict and thus eliminate any question of fact.

The Court: This is what I was thinking that you was going to make a motion for judgment notwithstanding the verdict and then we would have it. You are appearing for Payne and the elevator company?

We have quoted from the record to perhaps a needless extent; but owing to the conflicting claims of counsel we deem it desirable to

present as fully as possible the record made in the court below, upon which our decision must be based.

The sole question presented on this appeal is whether Payne and the Argusville Farmers' Elevator Company (or either of them) were indebted to or had in their possession or under their control any property belonging to the defendant John Wyman at the time they were served with the garnishment summons.

(1) In the recent case of Shortridge v. Sturdivant, 32 N. D. 154, 155 N. W. 20, we had occasion to consider and determine the nature and extent of a garnishee's liability. In that case we said: "Plaintiff's right to recover against the garnishee is predicated entirely upon defendant's right to recover in his own name and for his own use against the garnishee. Unless the defendant could so recover, neither can the plaintiff. A plaintiff by garnishment cannot place himself in a superior position as regards a recovery than is occupied by the principal defendant. The garnishee's liability is measured by his responsibility and relation to the defendant. He can be charged only in consistency with the subject of his contract with the defendant. And if by any pre-existing bona fide contract his accountability has been removed or modified, it follows that the garnishee's liability is correspondingly affected; for the garnishment cannot change the nature of the contract between the garnishee and the defendant, nor prevent the garnishee from performing his contract with third persons."

It is obvious that the trust agreement, if valid, transferred Wyman's interest in the grain involved herein to Hollister as trustee for the benefit of the Northern Trust Company. But plaintiff contends that the trust agreement is void and of no effect. He says: (1) The trust agreement was in fact a chattel mortgage, and as such void as against Wyman's creditors because not filed for record; (2) if the agreement be construed and sustained as an absolute transfer, it is void because there was no sufficient delivery or change of possession of the personal property purported to be transferred. We deem it unnecessary to determine the character of the instrument, or whether (under our laws) such an instrument must in all cases be deemed a mortgage. For the purposes of this opinion we shall consider the instrument in both aspects.

(2) In a discussion which arose during the course of the trial,

plaintiff's counsel said: "At most this agreement is only security for actual advances, which advances, as far as the evidence shows, was never made and was kept a secret and is a fraud upon the creditors of John Wyman. I don't mean an actual fraud, but a constructive fraud."

And in his brief on this appeal, plaintiff says: "On the trial of the case plaintiff contended, and still contends, that Exhibit "C" (the trust agreement) was given as security; that it was in fact a chattel mortgage, and as such should have been filed in the office of the register of deeds of Cass county, as required by § 6758 of the Compiled Laws of 1913, and, not being filed, is void, as against creditors of Wyman and especially as to this plaintiff."

Section 6758, Comp. Laws 1913, cited and relied upon by plaintiff, reads: "A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith for value, unless the original or an authenticated copy thereof is filed by depositing the same in the office of the register of deeds of the county where the property mortgaged, or any part thereof, is at such time situated."

This section was construed by this court in the case of *Union Nat. Bank v. Oium*, 3 N. D. 193, 44 Am. St. Rep. 533, 54 N. W. 1034; and the decision in that case is a complete answer to plaintiff's contention. In that case this court held that "where a creditor attaches personal property covered by a mortgage, between the execution and delivery of the mortgage and the filing thereof, his lien is not superior to that of the mortgagee, under the statute . . . declaring such mortgage void as to creditors unless filed, where the debt for which he attaches existed before the giving of the mortgage, and the creditor has not altered his position to his detriment since the mortgage was given, and before the filing thereof."

In denying a petition for rehearing in *Union Nat. Bank v. Oium*, the court said: "We hold that one who attaches for a debt incurred before any default in filing the mortgage exists is not entitled to the protection of the statute; that he is not within its manifest policy and spirit. To bring himself within the act, he must show that he parted with value while the default existed."

In the case at bar the debt for which plaintiff sued was due almost

two years before the trust agreement was executed. Obviously plaintiff did not in any manner alter his position to his detriment between the execution and delivery of the trust agreement and the service of the garnishment summons. Under the express holding of *Union Nat. Bank v. Oium*, *supra*, plaintiff is not within the provisions of the statute.

(3) The plaintiff further contends (as already stated) that if the trust agreement was intended, and be construed, as an absolute transfer, it should have been accompanied by an actual and continued change of possession; that in this case there was no such delivery or change of possession, and that consequently the trust agreement is void under § 7221, Compiled Laws 1913, which provides: "Every sale made by a vendor of personal property in his possession or under his control, and every assignment of personal property, unless the same is accompanied by an immediate delivery and followed by an actual and continued change of possession of the property sold or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor or assignor, or subsequent purchasers or encumbrancers in good faith and for value, unless those claiming under such sale or assignment make it appear that the same was made in good faith and without any intent to hinder, delay, or defraud such creditors, purchasers, or encumbrancers."

It will be observed that failure to comply with the statute regarding delivery and change of possession of personal property is not conclusive, but only presumptive, evidence of fraud. See also *Drinkwater v. Pake*, 33 N. D. 190, 156 N. W. 930; *Moores v. Tomlinson*, 33 N. D. 638, 157 N. W. 685.

And where there is any substantial evidence tending to show an actual and continued change of possession, it is a question of fact for the jury to determine whether there has been such change. 20 Cyc. 543.

It is of course obvious that the sufficiency of the change of possession must, to a large extent, depend upon the character of the property involved. "So, where personal property sold is not reasonably susceptible of actual manual delivery, a constructive delivery is sufficient, and it is not necessary that the vendee should do more than assume such control of it as reasonably to indicate the fact of the

change of ownership and the termination of the vendor's control." (20 Cyc. 545.) And "when chattels are in the possession of a bailee no actual delivery is necessary. The delivery of a bill of sale completes the transaction between the parties, and it is good as against creditors and subsequent purchasers if the purchaser give the bailee notice of the sale before the goods are taken from his possession, unless it is otherwise fraudulent." 20 Cyc. 546.

The property involved in the case at bar consisted of grain, in shock or stack, situated upon the lands where such grain had been grown. This property was not capable of manual delivery, and the evidence tends to show that the tenants in possession of the grain were notified of the change of ownership, and that the grain was stored and sold in the name of the Northern Trust Company or George H. Hollister. And it is undisputed that all the proceeds arising from the sale of this grain were received and expended by George H. Hollister in accordance with the provisions of the trust agreement.

(4) It is asserted by the plaintiff, however, that the sale by Wyman to Veitch of certain oats shows that Wyman was permitted to retain possession of, and exercise acts of ownership over, the grain, subsequent to the execution of the trust agreement. We have heretofore set out in full all the evidence bearing upon the sale of the oats.

A party who asserts fraud has the burden of proving it. Until the contrary is shown, it will be presumed that the law has been obeyed; that private transactions have been fair and regular; and that the ordinary course of business has been followed. Comp. Laws 1913, § 7936, subds. 19, 20, 31.

The sale of the oats to Veitch was a natural incident of an adjustment between a landlord and tenant.

The trust agreement was executed and delivered on August 22, 1913. The garnishment summons was served upon Veitch on August 29, 1913. Veitch says he first threshed the barley and hauled and delivered that at the elevator, and thereupon threshed the oats and put that in the granary on the farm. He also says: "We was through with the oats when the garnishee was served." When asked by plaintiff's counsel if he bought the oats after they were threshed, he answers that he bought them when he "first started to thresh on the Tolson place *eight or ten days before that.*" And in answer to a question subsequently

propounded by the court, Veitch answers that he bought the oats about a week before he was served with the garnishment summons. No attempt was made to obtain a more specific answer or have Veitch fix a more definite time.

This evidence falls far short of showing that the sale to Veitch was made subsequent to the execution of the trust agreement. Nor is there a scintilla of evidence tending to show any knowledge of, or consent to, such sale by the Northern Trust Company or George H. Hollister.

(5) Plaintiff also contends that the trust agreement is void for the reason that it provides that the surplus, if any, is to be turned over to Mrs. Wyman. It is a general rule, well settled, that a person cannot settle his estate in trust for his own benefit so as to be free from liability for his debts. And one of the "tests of a fraudulent conveyance is that it reserves to the grantor an advantage inconsistent with its avowed purpose or secures for him an unusual indulgence, and as a general rule any provision in a transfer of property by a person indebted at the time whereby he reserves or secures a benefit to himself or family at the expense of his creditors is, unless assented to by them, deemed to be evidence of fraud, either actual or constructive, and renders the transfer liable to be avoided at the instance of such creditors. To render the transfer fraudulent, however, there must be some reservation of an interest in the property itself, or some reservation inconsistent with a genuine transfer. The effect of a reservation of an interest for the grantor's benefit depends to a great extent upon the character of the instrument. A reservation which results from the nature and character of the transfer, and which, whether expressed or not, the law operating upon the transfer would confer, is not as a general rule to be deemed the reservation of a benefit rendering the transfer fraudulent." 20 Cyc. 555. See also 20 Cyc. 561.

In the case at bar the land first described in the trust agreement was the property of Mrs. Wyman. The only property mentioned in the trust agreement belonging to John Wyman were the crops involved in this action. These crops were grown upon lands to which Wyman's title had been canceled by the decree of the district court. It will be noted that the entire trust agreement is drawn with reference to

the lands owned by Mrs. Wyman. The crops on the land involved in the litigation (possibly an afterthought) were included in the last paragraph of the agreement. The trust agreement was entered into under circumstances which tend to negative rather than establish fraud. It was essential for Wyman to obtain an appeal bond in the sum of \$16,000. In order to obtain this bond he was required to furnish certain security to the trust company which executed the bond. In order to furnish such security, Mrs. Wyman hypothecated two sections of land in Traill county. Wyman hypothecated merely his interest in the crops produced on the land to which his title had been adjudged void by the district court's judgment. The trust agreement authorized the trustee to sell the lands belonging to Mrs. Wyman, and her share of the crops grown thereon. Obviously the proceeds therefrom, in excess of those required to be expended in performance of the trust agreement, should revert to her. So far as the evidence in this case shows, there was no surplus, but every cent received by the trustee was expended by him in the performance of the trust.

It is suggested that in view of the fact that the district court's judgment was reversed, that all liability assumed by the Northern Trust Company thereby became discharged, and that consequently the trustee would have no occasion to expend any moneys under the trust agreement. A sufficient answer to this contention is that the evidence shows that the trustee did expend every dollar of money which he received for the various purposes authorized by the trust agreement; and the record shows that the case of *Schinzer v. Wyman* was not finally determined by this court until April 22, 1914, and the liability of the Northern Trust Company, under its bond, continued at least until that time.

The right of the plaintiff in this action and of the respective garnishees must be determined as of August 29, 1913. The question is whether, at that time, the garnishees were indebted to, or had in their possession, or under their control, any property belonging to John Wyman. *Mahon v. Fonsett*, 17 N. D. 104, 115 N. W. 79. In our opinion they did not. The property involved herein had been transferred by Wyman to Geo. H. Hollister as trustee, for the benefit of the Northern Trust Company.

(6) Plaintiff also asserts that the evidence relative to the trust

agreement was inadmissible under the affidavits denying liability. The record shows that no objection was made to this evidence at the trial upon this, or any similar, ground. The objections made by plaintiff's counsel were based upon wholly different grounds. Such objections were predicated upon the alleged grounds that the trust agreement had not been recorded; that plaintiff had no knowledge thereof; that it was not binding upon the plaintiff; that the judgment in the case of *Schinzer v. Wyman*, 27 N. D. 489, 146 N. W. 898, had been reversed, and that therefore no liability attached to the official bond furnished by the Northern Trust Company. It will be noted that the objections urged upon the trial were based upon grounds wholly different from that now presented. The objections at the trial were directed at the validity and existence of the trust agreement. They were directed at the legal effect of the evidence, i. e., they were in the nature of a recital or argument in support of the proposition that the agreement was insufficient to defeat plaintiff's right of recovery.

The objections presented upon the trial wholly failed to apprise the adverse party or the trial court of the ground now urged. In fact the record is most persuasive evidence that plaintiff's counsel at that time had no intention of objecting upon such ground. Plaintiff's counsel first urged this ground upon the hearing of the motion for judgment notwithstanding the verdict or for a new trial. In disposing of the objection, the trial court, in its memorandum decision, said: "Attorneys ought not to try a case upon one theory, and then, upon motion for judgment '*non obstante*' or in the supreme court, adopt another. *Lynn v. Seby*, 29 N. D. 420, L.R.A.1916E, 788, 151 N. W. 33 (last paragraph). Had an objection been interposed that the 'defensive matters were not pleaded,' doubtless the attorneys for the garnishees (who, by the way, did not prepare the disclosure) would doubtless have asked to amend, which application would have been properly and promptly granted. *Rock v. Collins*, 99 Wis. 630, 67 Am. St. Rep. 885, 75 N. W. 426."

Without deciding whether the evidence relative to the trust agreement was admissible under the general affidavits denying liability, we need only say that no objection was made to the evidence upon the trial on this, or any similar, ground. The objections made were on wholly different grounds. And the rule is well settled that "an

objection upon one ground does not go to other grounds not stated, and is a waiver of all grounds of objection not specified." 9 Enc. Ev. 100; 38 Cyc. 1397. See also *Rickel v. Sherman*, 34 N. D. 298, 158 N. W. 266; *Buchanan v. Minneapolis Threshing Mach. Co.* 17 N. D. 343, 116 N. W. 335; *Flora v. Mathwig*, 19 N. D. 4, 121 N. W. 63; *Nitschka v. Geiszler*, 23 N. D. 412, 137 N. W. 454; *Seckerson v. Sinclair*, 24 N. D. 625, 140 N. W. 239; *Dallas v. Luster*, 27 N. D. 450, 147 N. W. 95; *Kersten v. Great Northern R. Co.* 28 N. D. 3, 147 N. W. 787.

The judgments against the garnishees are reversed and the trial court is directed to dismiss the garnishment action.

NORTHERN TRUST COMPANY, a Corporation, v. JOHN BRUEGGER and the News Printing Company, a Corporation.

(159 N. W. 859.)

Action on a promissory note for \$5,000 by Bruegger as maker to the News Printing Company, payee, dated in May, 1910, and indorsed to plaintiff. *Held*: **Jury — findings of — promissory note — delivery of — escrow agreement — evidence — sufficiency.**

1. Evidence is sufficient to sustain the findings of the jury that the note was delivered to one Hollister, managing officer of both the payee and plaintiff corporations, and under an escrow agreement, and that the delivery to the payee by the holder in escrow was made in disregard of and contrary to and without compliance with the terms of the escrow agreement.

Promissory note — delivery of — in law.

2. A delivery so made constitutes in law no delivery of the instrument.

Promissory note — escrow agreement — compliance with — delivery not so made — note void — evidence.

3. Under such findings the instrument never was delivered and has been void *ab initio*, and the evidence offered by defendant to establish the escrow agreement was admissible.

Note.—On necessity of strict compliance with conditions of escrow agreement, see note in L.R.A.1016A, 502.

Escrow agreement — waiver of conditions — estoppel — defense — evidence.

4. Bruegger has not waived the conditions of the escrow agreement, nor estopped himself from asserting it as a defense.

Promissory note — conditions of execution and delivery — may be shown — correspondence — explained by oral testimony.

5. The correspondence soliciting the note and transmitting it to the holder in escrow discloses that it is but part of and supplementary to the conditions under which the note was executed and was to be delivered. The correspondence can therefore be explained and supplemented in such particulars by oral testimony.

Controverted facts — findings of jury — conclusive.

6. A controverted question of fact as to the existence of an escrow agreement and as to its conditions was presented, and the verdict of the jury thereon is conclusive on this review of error.

Issues — newspaper — financial condition — stock — worthlessness of — holding company — evidence as to — admissible.

7. Evidence received as to the financial condition of the newspaper plant involved and the worthlessness of the stock of the holding company owning and operating it was admissible under the issues tendered by the pleadings.

Contract — rescission of — election as to defenses — motion to compel — issues — must be confined to.

8. No question of rescission of a contract was involved, and the motion to require defendant to elect as to defenses was properly denied.

Instructions — requested and refused — issues — fairly submitted.

9. Instructions requested and refused, and those given and challenged as error and argued in the brief examined and held to fairly submit the issues of fact and to be nonprejudicial.

Statements of counsel — argument to jury — erroneous — new trial — not ground for.

10. Statements of counsel in argument to the jury do not warrant the granting of a new trial.

Instructions — directing jury to find for plaintiff — equivalent to granting motion therefor — rights of defendant — not prejudiced thereby.

11. The court at the close of the testimony denied a motion to direct judgment against the News Printing Company, codefendant, but instead, in its instructions, required the jury to find in any event for the plaintiff and against the News Printing Company for the amount claimed. This action did not prejudice defendant's rights, and is the equivalent of the granting of a motion for a directed verdict.

New trial — affidavits on motion for — surprise — newly discovered evidence — insufficient — properly denied.

12. The showing for a new trial on affidavits, on the grounds of surprise and newly discovered evidence, was insufficient, and denial of the motion was proper.

Substantial error — not shown — judgment — affirmed.

13. No substantial or prejudicial error is shown, and the judgment appealed from is affirmed.

Opinion filed October 10, 1916.

**Appeal from the District Court of Cass County, *Pollock*, Judge.
Affirmed.**

Pierce, Tenneson, & Cupler, for appellant.

To constitute an escrow the instrument must be delivered to a stranger. Delivery to any party to the instrument is complete delivery. The note is then valid, subject to counterclaim for damages for breach of any condition on which it was delivered. 11 Am. & Eng. Enc. Law, 337 et seq.; 16 Cyc. 573; *Dils v. Bank of Pikeville*, 109 Ky. 757, 60 S. W. 715.

If the proposed oral testimony is in any way inconsistent with the terms of the written instrument, it is wholly inadmissible. *Elliott*, Contr. § 1631.

If clear the language of the writing governs, and the intention of the parties must be ascertained from the written instrument. Rev. Codes 1905, §§ 5342, 5343, 5348, Comp. Laws 1913, §§ 5898, 5899, 5904.

The only criterion of the completeness of a written contract as a full expression of the agreement of the parties is the writing itself. 17 Cyc. 673, 675, 715, 717, 746, 747; *Samuel H. Chute Co. v. Latta*, 123 Minn. 69, 142 N. W. 1048; *Jones*, Ev. §§ 454, 460.

The circumstances and situation of the parties may be shown by parol, but the language of the parties is excluded where inconsistent with the contract. *Palmer v. Albee*, 50 Iowa, 433; 9 Enc. Ev. 374-377; *Tuttle v. Burgett*, 53 Ohio St. 498, 30 L.R.A. 214, 53 Am. St. Rep. 649, 42 N. E. 427.

A contract which is voidable solely for want of due consent may be

ratified by a subsequent consent. Rev. Codes 1905, § 5309, Comp. Laws 1913, § 5865.

Or by acceptance of the benefits, so far as the facts are known, or ought to be known, to the party accepting. 8 Cyc. 65, note 61; Lee v. McClelland, 120 Cal. 147, 52 Pac. 300; Nounnan v. Sutter County Land Co. 81 Cal. 1, 6 L.R.A. 219, 22 Pac. 515; Rev. Codes 1905, §§ 5310, 6701 to 6703, Comp. Laws 1913, §§ 5866, 7288 to 7290.

Waiver and ratification cannot be alleged by a stranger to any contract, but may always be proved where the suit is between the parties to the contract, a breach of which is alleged. 16 Cyc. 789, 879, note 20, citing; Canale v. Copello, 137 Cal. 22, 69 Pac. 698; Crutchfield v. Hudson, 23 Ala. 393; Letcher v. Morrison, 27 Ill. 209; Hoit v. McIntire, 50 Minn. 466, 52 N. W. 918.

Where property held in escrow is wrongfully delivered, the transaction may be repudiated unless assent or ratification, with knowledge of the pertinent facts, follows. Daniels v. Cower, 54 Iowa, 319, 3 N. W. 424, 6 N. W. 525; Blight v. Schenck, 10 Pa. 285, 51 Am. Dec. 478; Langdon v. Brown, 160 Pa. 538, 28 Atl. 921; Jackson v. Lynn, 94 Iowa, 151, 58 Am. St. Rep. 366, 62 N. W. 704.

A person who knowingly receives and accepts the benefits of a contract or transaction may be estopped to question the existence, validity, and effect of the contract. 16 Cyc. 787; Lake Street Elev. R. Co. v. Carmichael, 184 Ill. 348, 56 N. E. 372; Lane v. Pacific & I. N. R. Co. 8 Idaho, 230, 67 Pac. 656; Collins v. Cobe, 202 Ill. 469, 66 N. E. 1079; Morris v. Ewing, 8 N. D. 103, 76 N. W. 1047; Rev. Codes 1905, §§ 5310, 6701-6703, Comp. Laws 1913, §§ 5866, 7288-7290.

If the defrauded party acquires knowledge of the fraud while the contract remains executory, and thereafter does any act in performance or affirmance of the contract, or exacts performance from the other party, he thereby condones the fraud and waives his right of action. 20 Cyc. 92; Fitzpatrick v. Flannagan, 106 U. S. 648, 660, 27 L. ed. 211, 215, 1 Sup. Ct. Rep. 369; Schmidt v. Mesmer, 116 Cal. 267, 48 Pac. 54; Kingman & Co. v. Stoddard, 29 C. C. A. 413, 57 U. S. App. 379, 85 Fed. 740; Simon v. Goodyear Metallic Rubber Shoe Co. 52 L.R.A. 745, and cases cited on page 747, 44 C. C. A. 606, 105 Fed. 573; 9 Cyc. 244; Omaha Lumber Co. v. Co-operative Invest. Co. 55 Colo. 271, 133 Pac. 1112.

A fraudulent intent is an essential element of fraudulent concealment. 20 Cyc. 36, note 40, 118, note 81.

In fraud cases the proof must be "clear," "satisfactory," "convincing." *Ley v. Metropolitan L. Ins. Co.* 120 Iowa, 203, 94 N. W. 570; 20 Cyc. 39, note 54; *Sioux Bkg. Co. v. Kendall*, 6 S. D. 543, 62 N. W. 377; *Taylor v. Guest*, 58 N. Y. 262.

There is no proof of the actual damages. Such proof as was offered is largely speculative. Proof of damages must relate back to the day of sale and purchase of the newspaper. *Gunderson v. Havana-Clyde Min. Co.* 22 N. D. 329, 133 N. W. 554; *Fargo Gas & Coke Co. v. Fargo Gas & E. Co.* 4 N. D. 219, 37 L.R.A. 593, 59 N. W. 1066; *Boddy v. Henry*, 113 Iowa, 462, 53 L.R.A. 769, 85 N. W. 771.

Evidence of a partial failure of consideration cannot be offered under an answer claiming a total failure of consideration. *Nichols & S. Co. v. Dallier*, 23 N. D. 532, 137 N. W. 570; 8 Cyc. 162, 163.

If the instructions of the court fail to cover a material part of the case, no request is necessary to preserve the right to claim error. *Putnam v. Prouty*, 24 N. D. 517, 140 N. W. 93; Rev. Codes, 1905, § 7021, Comp. Laws 1913, § 7620.

Where defenses are so inconsistent that the proof of one necessarily disproves the other, a motion to compel election should be granted. *Murphy v. Russell*, 8 Idaho, 133, 67 Pac. 426; *Wendling v. Pierce*, 27 App. Div. 517, 50 N. Y. Supp. 509; *Seattle Nat. Bank v. Carter* (*Seattle Nat. Bank v. Jones*) 13 Wash. 281, 48 L.R.A. 771, 43 Pac. 331; 31 Cyc. 151, note 33.

It was error to permit counsel for defendant to comment on plaintiff's reasons for joining the printing company, as a defendant, and to state that it was done to prevent a change of venue. 38 Cyc. 1492, note 57-60, 1493, note 79-81, 1498; *Keniston v. Todd*, 139 Iowa, 287, 117 N. W. 674; *Fry v. Bennett*, 3 Bosw. 200, 28 N. Y. 324; *Rasciot v. Royal Neighbors*, 18 Idaho, 85, 29 L.R.A.(N.S.) 441, 138 Am. St. Rep. 180, 108 Pac. 1048; *Neff v. Cameron*, 213 Mo. 350, 18 L.R.A.(N.S.) 327, 127 Am. St. Rep. 606, 111 S. W. 1139.

Where an officer of a corporation is interested in a note, his knowledge will not be imputed to the corporation for which he is acting in purchasing the note. 5 Cyc. 461; *Lilly v. Hamilton Bank*, 29 L.R.A.(N.S.) 558, 102 C. C. A. 1, 178 Fed. 53; *Mead v. Pettigrew*, 11 S.

D. 529, 78 N. W. 945; Thompson v. McKee, 5 Dak. 172, 37 N. W. 367.

The court committed error in requiring the plaintiff to amend the complaint when the Northern Trust Company was substituted for the Northern Savings Bank. The law did not require or call for such amendment. Rev. Codes 1905, § 6820, Comp. Laws 1913, § 7408; 20 Enc. Pl. & Pr. 1062; 31 Cyc. 487; Smith v. Zalinski, 94 N. Y. 524; 37 Century Dig. Parties, § 99; Decen. Dig. Parties, § 63.

V. R. Lovell and Engerud, Holt, & Frame, for respondents.

This suit is on a promissory note given by Bruegger to the News Printing Company and by such company indorsed to Northern Trust Company. The latter could not claim to be a bona fide purchaser, because Hollister, who was the president and managing officer of the trust company, had full knowledge of the infirmity in the note, and the trust company was chargeable with Hollister's knowledge. Hal-loran v. Holmes, 13 N. D. 418, 101 N. W. 310; McCarty v. Kepreta, 24 N. D. 395, 48 L.R.A.(N.S.) 65, 139 N. W. 992, Ann. Cas. 1915A, 834.

The rule against impeaching a written agreement by oral evidence has no application, for the reason that the letter, exhibit "6," does not state what the agreed conditions were. 9 Cyc. 772; Ingram v. Dailey, 123 Iowa, 188, 98 N. W. 627; 9 Enc. Ev. 345, 346, 462.

All of those interested—the principals—in the newspaper held a meeting and agreed to launch the stock subscription enterprise, and agreed upon the general outlines of the plan. They delegated to a committee authority to arrange the details. This involved stating specifically what the plan was, the details of it, and manner of carrying it into effect. Therefore the statement of the plan of the meeting, prepared by this committee, is the best obtainable evidence of what the meeting resolved to do. Black v. Lamb, 12 N. J. Eq. 108; 1 Enc. Ev. 574; Pierce v. Roberts, 57 Conn. 31, 17 Atl. 278; Neely v. Naglee, 23 Cal. 152; Matzenbaugh v. People, 194 Ill. 108, 88 Am. St. Rep. 134, 62 N. E. 549; Copeland v. Boston Dairy Co. 184 Mass. 207, 68 N. E. 218; 16 Cyc. 1003; 1 Greenl. Ev. §§ 113 et seq.

We are not here dealing with a voidable contract, here the contract is valid and binding unless disaffirmed by the injured party promptly

upon discovering that it was brought into existence by fraud, duress, etc.

The delivery of an escrow contrary to the plain conditions of the escrow agreement is a void act, and such a wrongful delivery by the escrow holder gives no life to the instrument so wrongfully delivered. 16 Cyc. 579-582.

The escrow holder is the agent of the author of the escrow, as well as for the other party, for the special purpose of the escrow agreement. *Mechanics' Nat. Bank v. Jones*, 76 App. Div. 534, 78 N. Y. Supp. 800; *Davis v. Clark*, 58 Kan. 100, 48 Pac. 563; *Shirley v. Ayres*, 14 Ohio 308, 45 Am. Dec. 546; *Lewis v. Prather*, 14 Ky. L. Rep. 749, 21 S. W. 538; *McDonald v. Huff*, 77 Cal. 279, 19 Pac. 499; *Gammon v. Bunnell*, 22 Utah, 421, 64 Pac. 958.

In determining whether or not the author of the escrow (the principal) has ratified or affirmed the unauthorized act of the escrow holder, we must be guided by the same principles that apply in any other case of agency. It is unlike a transaction voidable for fraud, duress, etc., which is valid if not promptly disaffirmed. This case presents the very opposite condition. The unauthorized act is invalid, and remains so unless made good by ratification or estoppel. Rev. Codes 1905, § 5763, Comp. Laws 1913, § 6331; *Morris v. Ewing*, 8 N. D. 99, 76 N. W. 1047.

In this case, if there were ratification, it could only be by an implied agreement resulting from Bruegger's conduct, for no express agreement is claimed, and in order to imply such an agreement, it must clearly appear that Bruegger had knowledge that the conditions of the escrow agreement had been violated. 1 *Mechem, Agency*, 2d ed. § 438; *Oxford Lake Line v. First Nat. Bank*, 40 Fla. 349, 24 So. 483; *Leonardson v. School Dist.* 125 Mich. 209, 84 N. W. 63.

In the absence of an express or implied ratification by agreement, the unauthorized delivery of the escrow can be validated only by estoppel. *Gjerstadengen v. Hartzell*, 9 N. D. 268, 81 Am. St. Rep. 575, 83 N. W. 230; *Eickelberg v. Soper*, 1 S. D. 563, 47 N. W. 953; *Sutton v. Consolidated Apex Min. Co.* 15 S. D. 410, 89 N. W. 1020; 16 Cyc. 583-584, 722-747; *Balfour v. Hopkins*, 35 C. C. A. 445, 93 Fed. 564; *Dixon v. Bristol Sav. Bank*, 102 Ga. 461, 66 Am. St. Rep. 193, 31 S. E. 96; *Everts v. Agnes*, 6 Wis. 453; *Cotton v. Gregory*, 10

Neb. 125, 4 N. W. 485; Jackson v. Lynn, 94 Iowa, 151, 58 Am. St. Rep. 386, 62 N. W. 704; Quick v. Milligan, 108 Ind. 419, 58 Am. Rep. 49, 9 N. E. 392.

Silence, or inaction alone, is wholly insufficient to prove a ratification. There must be present other facts and circumstances justifying the inference that the silence or inaction was assent. *Brown v. Henry*, 172 Mass. 559, 52 N. E. 1073; *Smith v. Fletcher*, 75 Minn. 189, 77 N. W. 800.

The certificate issued to Bruegger was for preferred stock. It carried no voting power, and the holder of it had no voice in the management of the corporation. The certificate was in every sense a worthless piece of paper, and its retention was not the receiving and accepting and retaining of a benefit derived from the transaction, and did not constitute ratification. *Boggs v. Wann*, 58 Fed. 686; *Manning v. Albee*, 11 Allen, 520; *Bishop v. Thompson*, 196 Ill. 206, 63 N. E. 684; 1 Bigelow, Fr. pp. 424, 425.

The matter of argument of counsel to the jury is largely a matter of discretion resting in the trial court. Counsel has the right to draw logical inferences from the evidence so long as his comment is kept within the record.

In any event, comment on matters, even though they are not covered by the evidence, will not afford ground for reversal where the verdict is correct, and prejudice is not actually shown to have resulted. *Chamberlain v. Lake Shore & M. S. R. Co.* 122 Mich. 477, 81 N. W. 339; *Chicago & A. R. Co. v. Pillsbury*, 123 Ill. 9, 5 Am. St. Rep. 483, 14 N. E. 22; *Miller v. Boone County*, 95 Iowa, 5, 63 N. W. 353; *Avery v. Burrall*, 118 Mich. 672, 77 N. W. 272; *Angle v. Bilby*, 25 Neb. 595, 41 N. W. 397; *Heater v. Penrod*, 2 Neb. (Unof.) 711, 89 N. W. 762; *Boltz v. Sullivan*, 101 Wis. 608, 77 N. E. 870, 5 Am. Neg. Rep. 508; *Kerlin v. Swart*, 143 Mich. 228, 106 N. W. 710; *Campbell Turnp. Road Co. v. Maxfield*, 28 Ky. L. Rep. 1198, 91 S. W. 1135; *Chicago & A. R. Co. v. Dillon*, 123 Ill. 570, 5 Am. St. Rep. 559, 15 N. E. 181; *Brusie v. Peck Bros. & Co.* 42 N. Y. S. R. 801, 16 N. Y. Supp. 648.

The plaintiff, the Northern Trust Company, was not a bona fide holder of the note, because Hollister, the president and manager of such company, knew of all the facts and of the infirmity in the note,

and his knowledge is imputed to his company, for which he was acting in such transaction. *Emerado Farmers' Elevator Co. v. Farmers' Bank*, 20 N. D. 270, 29 L.R.A.(N.S.) 567, 127 N. W. 522; *First Nat. Bank v. Blake*, 60 Fed. 78; *Ditty v. Dominion Nat. Bank*, 22 C. C. A. 376, 43 U. S. App. 613, 75 Fed. 769; *Le Duc v. Moore*, 111 N. C. 516, 15 S. E. 888; *Brobston v. Penniman*, 97 Ga. 527, 25 S. E. 350; *Holden v. New York & E. Bank*, 72 N. Y. 286; *Cook v. American Tubing & Webbing Co.* 28 R. I. 41, 9 L.R.A.(N.S.) 193, 65 Atl. 641; *Smith v. Wilson & B. Sav. Bank*, 1 Tex. Civ. App. 115, 20 S. W. 1119; *Lowndes v. City Nat. Bank*, 82 Conn. 8, 22 L.R.A.(N.S.) 408, 72 Atl. 150; *First Nat. Bank v. New Milford*, 36 Conn. 93; *Citizens' Sav. Bank v. Walden*, 21 Ky. L. Rep. 739, 52 S. W. 953; *Fishkill Sav. Inst. v. National Bank*, 80 N. Y. 162, 36 Am. Rep. 595; *Loring v. Brodie*, 134 Mass. 453; *National Bank v. Feeney*, 9 S. D. 550, 46 L.R.A. 732, 70 N. W. 874; *Oak Grove & S. V. Cattle Co. v. Foster*, 7 N. M. 650, 41 Pac. 522; *City Nat. Bank v. Martin*, 70 Tex. 643, 8 Am. St. Rep. 632, 8 S. W. 507; *Traders' Nat. Bank v. Smith*, — Tex. Civ. App. —, 22 S. W. 1056; *Union Bank v. Wando Min. & Mfg. Co.* 17 S. C. 339; *National Bank v. Munger*, 36 C. C. A. 659, 95 Fed. 87; *Hobbs v. Boatright*, 195 Mo. 693, 5 L.R.A.(N.S.) 906, 113 Am. St. Rep. 709, 93 S. W. 934; *Niblack v. Cosler*, 74 Fed. 1000, 26 C. C. A. 16, 47 U. S. App. 637, 80 Fed. 596.

Goss, J. This action is brought on a promissory note for \$5,000, dated May 23rd, 1910, to the News Printing Company by John Bruegger, maker, and due December 1, 1910, and owned by the Northern Trust Company. The sole defense submitted to the jury was that the maker had deposited the note in escrow under an escrow agreement subsequently not complied with, and under which it was not to be delivered to the payee until at least \$45,000 more had been raised by sale of corporate stock of the News Printing Company, payee. That plaintiff purchased the note after its maturity; other defenses of fraud, misrepresentation, and concealment on Hollister's part to Bruegger, and damages to defendant maker to the amount of the note because of its attempted delivery in violation of said escrow agreement, are pleaded, but abandoned on trial. At the close of the case the question submitted was that of nondelivery, raising issues of fact of (1) whether

the note was delivered by Bruegger to Hollister under any escrow agreement at all; and, (2) if so, what were the terms thereof? (3) if delivered under an escrow agreement, whether the terms of that agreement were violated by Hollister; (4) whether Bruegger has waived or estopped himself to assert an escrow delivery as a defense. Assignments raise alleged error in rulings and on instructions and also the sufficiency of the proof to sustain the verdict in Bruegger's favor.

A brief résumé is necessary of circumstances attending upon the delivery of the note. In 1910 the News Printing Company was incorporated by Hollister and Democratic associates, F. O. Hellstrom and J. C. McAndress, looking toward the securing and controlling of the Fargo Daily News as a Democratic organ in the coming campaign. Bruegger was a Democratic candidate for nomination as United States Senator at the primaries in June, 1910, and was nominated. In 1908 he had indorsed a note for \$1,000 used toward financing said newspaper. But that note was returned to him upon his signing along with thirty-six other prominent Democrats of a written guaranty of payment of notes of the News Printing Company to the Northern Trust Company. This was done through Hollister as active officer of and for the Northern Trust Company, its president in 1910. He was also the managing officer of the News Printing Company and of the Northern Savings Bank, intervening holder of this note in suit and subsequently chartered in 1911. The mortgage to the Northern Trust Company, thus guaranteed, fell due in March, 1910. A second mortgage for \$10,000 and interest aggregating over \$12,000 to a trustee for the Merchants National Bank was also past due, with foreclosure threatened. Other debts were owing. In December, 1909, arrangements had been made for a \$50,000 issue of trust bonds to meet these mortgages, but it was not consummated except that T. F. Marshall, Jas. Buchanan, A. J. Gronna, Amasa Peake, and other "insurgent" Republicans had subscribed for the purchase of \$35,000 worth of this \$50,000 bond issue, and in January, 1910, paid in \$12,000, to be used in redeeming the newspaper from the contemplated foreclosure of the \$10,000 second mortgage. This sum, together with about \$300 furnished by the newspaper, had been used for said purpose two months prior to the date of this note; the paper was purchased under the foreclosure sale, with title taken to Hollister, Hellstrom, and McAndress. They immediately

resold it to the News Printing Company, recently organized as a holding company, for an alleged consideration of \$50,000 of the stock of that company, of which they were the incorporators.

In March, 1910, Hollister and McAndress entered into a contract with D. H. McArthur, chairman of the Democratic state central committee, under which McArthur was to dictate the future political policy of the newspaper. Then, evidently realizing that, should the bonds subscribed for by the insurgent Republicans as subscribers be taken by them, the political policy of the paper would be under Republican instead of Democratic control, Hollister, McArthur, and others arranged for a meeting at Grand Forks on May 20, 1910, of many of the leading Democrats of the state. The meeting was held. There were present Bruegger, Joseph Kelly, W. L. Richards, Hollister, McArthur, and others. It might be mentioned that as a circumstance to stimulate interest in the meeting and in its attendance notice had been given by the Northern Trust Company of the protest and nonpayment of the \$30,000 first mortgage on the Fargo news plant, and notice that each of the thirty-seven subscribers to the indemnity bond as additional security to the mortgage would be asked to respond for the \$1,000 guaranty of each as subscribed.

As to the purposes of and events at the meeting, McArthur testifies: "The meeting was arranged by Hollister, myself, and McAndress. It was a meeting of the representative Democrats from different parts of the state. They were called together for the purpose of trying to raise sufficient money to take over the Fargo Daily News and make a Democratic paper of it. Hollister made a statement at that meeting with regard to the financial condition of the paper at the time, and I think he estimated it was necessary to have about \$50,000 to buy up the bonds and carry the floating indebtedness, and I think there was also some talk of a fund for a working fund, but am not sure as to the amount that was talked of that night. It was estimated there would be \$50,000 necessary to raise. They canvassed the situation that night among the boys that were there to see about how much they thought they could raise from the different districts they represented. And I think Bruegger went on record that night for \$5,000, as he thought he could raise that much up in that western part of the state, including Williams, Ward, and Burke counties. In all I think there was about

\$35,000 in sight that night. They canvassed the situation, and Kelly and myself were appointed a committee to kind of focus this matter and to see what could be done toward raising the balance. So we went West on the train,—Bruegger, Kelly, and myself. We continued the discussion of the proposition on the train. Kelly was very positive with regard to the full amount,—with regard to raising the full amount before anyone should pay over any money. After he got off at Devils Lake, Bruegger and myself continued the conversation, and I told him that the great difficulty in soliciting funds of this kind was to get a starting point somewhere; that when you went to an individual to solicit a sale of stock, the usual question would be: ‘Who is taking stock?’ ‘Who is in on this?’ and on account of that condition of affairs I said it was uphill work unless some one would condescend to give it a start so that when you went to the next man you could say ‘John Brown or John Smith gave me so much, gave his note for so much;’ and in that connection Bruegger stated that he didn’t mind giving his note for the amount which he thought he could raise in his district,—provided they would be in good faith with him, providing the note would be held until the full amount was raised to make this a Democratic paper. So I assured him from my knowledge, from my acquaintance with McAndress and Hollister, that I thought they would be in good faith and that he would be perfectly safe in putting the note up on those conditions, and that it would help us out greatly in soliciting other sales of stock. And I called Hollister’s attention to it over the phone that night, and said I thought that if Bruegger was given to understand his note wouldn’t be used until the full amount was raised sufficient to put the newspaper in the clear and make a Democratic paper of it, he wouldn’t mind putting up his note for \$5,000 as a starter. That is as it was.”

Q. State what, if anything further, was said by you to Bruegger at or about that time with regard to his note not being cashed until at least \$50,000 had been raised.

A. That was the sum,—at least have to be \$50,000.

Joseph M. Kelly testifies to the understanding of the purpose and result of the Grand Forks meeting to be substantially as McArthur has related, and that it was deemed necessary to raise \$50,000 by sale

of corporate stock to put the newspaper on its feet, pay its mortgages and floating indebtedness, and that he and McArthur were appointed a committee to "go ahead and get these subscriptions," and that accordingly, on May 30, 1910, he issued over his own signature a general circular soliciting subscriptions in which the indebtedness of the paper is set forth as—

about \$50,000, and as the present owners of the News Printing Company feel that this is too heavy a load for them to carry alone, they ask that the Democrats of the state assist in carrying part of this load, and that they are willing to resign to them the entire management of the property. The plan that this committee has formulated is as follows: That subscription lists be sent to representative Democrats in different parts of the state, and that they be asked to circulate them in their districts. We inclose you such subscription list, and ask that you solicit your subscriptions from those most able to pay them. Subscribers will have the privilege of selecting either common or preferred stock of the News Printing Company. The preferred is entitled to the first earnings up to 6 per cent, and the common stock will be entitled to the management and any earnings over 6 per cent paid to the preferred. The present owners of the News have agreed to retain \$15,000 of the common stock so that \$35,000 more subscription will be sufficient. In the event that subscribers should not have funds convenient for payment, notes will be taken in payment for one year. It is unnecessary for us to dwell on the necessity of our having an organ with a state-wide circulation in order to more properly place our principles before the voters of the state. Aside from that, we believe that from now on, the plant will pay good dividends. . . . I will be glad if you would advise me what you can do in your district at an early date. Unless the full amount of \$50,000 is subscribed, we do not propose to go any further into it, as we would not deem it advisable to invest in the property unless we could absolutely control it. Yours truly,
(Signed) Jos. M. Kelly.

It is shown that this circular was sent to leading Democrats of the state. Some subscriptions were obtained. Kelly testified to having procured \$10,000 worth, but that he did not deliver them to Hollister because "we didn't have enough" to make up the \$50,000.

W. L. Richards, of Dickinson, testified he was present at said meeting, the object of which "was to finance this newspaper for the benefit of the Democratic party in the state;" that Hollister was present and explained the financial condition of the newspaper, stated of what its assets consisted, and "made the proposition that if we could raise \$75,000, that would pay off the indebtedness and give the paper a working capital of \$25,000 or about that."

Q. State whether or not the method proposed by Hollister for raising this money was by sale of the stock of the News Printing Company.

A. That is my remembrance of it.

Q. What, if anything, was said by Hollister with regard to the condition, if any, on which those subscriptions should be payable or should not be payable?

A. That unless this amount was paid none of us was bound on our obligation to take this stock.

Q. That the subscriptions would not be binding unless the full amount was paid in as you have stated?

A. Yes.

That a committee was appointed of McArthur and Kelly to carry out the program. That witness was solicited to purchase stock and paid \$500 cash for that amount of stock, sometime after the first of July, 1910.

Bruegger testifies he was present at that meeting with ten or twelve other prominent Democrats, among them McArthur, Hollister, McAndrews, and F. O. Hellstrom; that "the proposition on behalf of the News Printing Company was submitted by Mr. Hollister; . . . that the effort to raise at least \$50,000 was to be made in order to cover all of the indebtedness of the plant so that the Democrats would get absolute control of the paper and conduct the policy thereof; . . . the matter of raising the money was left to the individuals largely to see what sums they could raise in their districts; and at the close a committee was appointed that should have the authority to solicit subscriptions for that purpose."

Q. Subscriptions to what?

A. Subscriptions for to raise not less than \$50,000 in order to get the control of the newspaper.

Q. What were they going to be solicited to subscribe for?

A. For stock in the paper, in the News Printing Company.

Q. Now was any other method than by selling of stock proposed by Hollister or any individual representing him at that meeting?

A. In my recollection I would say not.

Q. Did you make any subscription at that meeting?

A. I don't think that I signed for anything, but I promised that I would raise in what was considered my territory \$5,000.

Q. You told the meeting you could get subscriptions for that amount you thought?

A. Yes.

Q. Now was anything said in the meeting about when these subscriptions would be payable; on what condition; if so tell what the substance of that condition was?

A. The substance was that nobody was to pay up any of the money for the subscriptions until the full amount had been raised.

Defendant then testifies that McArthur and Kelly were appointed a committee to push matters. They went West together toward their homes discussing the project.

Q. Now what did McArthur say to you with regard to a subscription, a conditional subscription to stock, if anything?

A. He explained the difficult feature that confronted him to start the subscription—to do anything with the subscription—was to get a start, and a good many people would be willing to help the movement along if it was shown that a start had been made. He went over the situation with me in reference to what he considered I could raise in this territory that had been allotted to me, and he suggested that if I would put up the note for \$5,000 that I had agreed that I would raise in this territory, it would help him in his work. He says that the note, if sent down to Hollister, would not be used until the whole sum being sought after had been raised, and that would give him the assistance he needed to get out and make the start. The whole amount to be raised was \$50,000.

Q. State what, if anything, he said to you with regard to how it was to be raised,—by the sale of what?

A. By the sale of the common and preferred stock of the News Printing Company.

Witness then reavers that "the understanding was unless the \$50,000 was raised the note would not be used." This Grand Forks meeting was held on the evening of May 20th, 1910.

On May 23rd, 1910, according to the corporate records of the News Printing Company, the following "waiver of notice of special meeting" was entered into:

We, the undersigned, representing and being the stockholders and owners of all of the capital stock of the News Printing Company, which has been sold, issued, and is outstanding at the date hereof (no preferred stock having been issued or is outstanding at the date hereof), do hereby consent that a special meeting of said corporation may be held at its office in the city of Fargo, North Dakota, on the 28th day of May, 1910, for the purpose of submitting to a vote of the stockholders the proposition of increasing the preferred stock of said corporation from \$50,000 to \$100,000, and by amending §§ 1 and 2 of art. VII. of the by-laws in reference to said preferred stock, and when and upon what notice the same may be retired; and we do each hereby specially waive all the requirements of law as to the publication and service of the notice of such meeting.

Dated, Fargo, North Dakota, May 23d, 1910.

(Signed) Geo. H. Hollister.

J. C. McAddress.

F. O. Hellstrom.

The corporate records disclose that said special meeting was held May 26, 1910, at which time by resolution of these three stockholders and "owners of all the capital stock of the News Printing Company, which has been sold, issued, and is outstanding," "the preferred capital stock of said News Printing Company be and the same is hereby increased from the sum of \$50,000 to the sum of \$100,000." The same resolution recites that "to date none of the preferred stock of the News Printing Company has been sold, issued, or is outstanding," and also limits the common stock issue to \$50,000, all of which had been issued in equal parts to Hollister, Hellstrom, and McAddress. Concerning this authorized increase of stock issue, Hollister testifies the reason for it was that "it was the object to have plenty of preferred stock for all that wanted to buy," and that this increase was

authorized May 26, 1910. It is obvious that it was one of the results of the Grand Forks conference, and was taken as a step toward the execution of the purpose for which Hollister, McAndress, McArthur, and others called and held that meeting.

Under these conditions in the finances of this newspaper, and with the necessity confronting its management of raising a large amount of money to meet its obligations to keep its political support; the Grand Forks meeting of leading Democrats called to considered these questions with Hollister and associates present and explaining the financial side of the matter and necessarily familiar with what was done; the appointment of a committee and its work at soliciting funds; the preparation by Hollister and his associates to deliver any amount of preferred stock the committee might sell up to \$100,000; that the raising of \$75,000 in that manner had been considered possible and desirable; the proximity of the coming primary election only a month away, rendering it advisable that the control of the paper be taken from the insurgent Republicans who had subscribed for \$35,000, and already taken and paid for \$12,000 of the \$50,000 bond issue authorized in the January, 1910; that the second mortgage had been foreclosed and the ownership of the plant and the responsibility and liability that accompanied ownership was in the News Printing Company, the *alter ego* of Hollister, Hellstrom, and McAndress, and with \$12,000 invested of the money subscribed by the insurgent Republicans of the \$50,000 bond issue to take up said second mortgage; the \$30,000 outstanding first mortgage overdue since March 1st, and not paid,—all this taken in connection with the testimony above narrated that at least \$50,000 should be raised by the sale of corporate stock of the News Printing Company, or the project to place the paper upon a sound financial basis and under Democratic control be entirely abandoned, reflects the proof of the facts, circumstances, and conditions under which defendant Bruegger asserts Hollister induced him to sign and deliver the note in question and under which and in the light of which he construed the letters received by him from Hollister or the Northern Trust Company by Hollister, and his answer thereto and his subsequent course of conduct until in December, 1910, when he disclaimed his liability on the note in suit. All this, together with McArthur's testimony that he informed Hollister of the circumstances

under which Bruegger had consented to start the subscription out with his \$5,000 note, is introductory to such correspondence now set forth. Under date of May 9, 1910, Hollister had written Bruegger as follows: "D. H. McArthur has stated to me that he had made arrangements with you for you taking an interest in the News Printing Company to the extent of \$1,000 at this time. . . . Am in hopes of getting this matter rounded up so that a half dozen can have, say, \$5,000 apiece, and control it. We have one of two others who are agreeable provided we can make the proper combination. . . . I hope to have matters in shape so that you can come in here and meet with the others in prospect and come to a final understanding and decision." Eleven days later the Grand Forks conference was held, and the plan to raise the money by the sale of stock was determined upon; McArthur, Kelly, and Bruegger had had the understanding, and McArthur had communicated it by phone to Hollister. Then by letter of May 23, 1910, upon Northern Trust Company letterhead, the following letter was received by Bruegger from Hollister. It is the letter under which the note in question was signed and transmitted, it reads:

"Mr. McArthur has communicated to me by telephone the substance of the conversation between you, Mr. Kelly, and himself, and stated that you would be guided by my judgment, or words to that effect. I hardly like this way of putting it up to me, but I do not know as I can blame you. We are working on the proposition and with good success, and are sure that the turn can be made and the money raised, but of course there is a chance of its not going through, and, really, the only fair way of doing this is to have the subscriptions held until there are enough in to turn the deal before using any of it, and that is the system we are adopting.

"With this understanding, I am inclosing herewith note for the amount agreed by you and if you will sign this and return to me, it will not be used until the deal is turned and money raised to put the paper in the clear.

"When this note comes due, this company will be glad to loan you at least half of it if you so desire, in renewal, and this note will probably be indorsed over to this company in the meantime so we will undoubtedly own it at maturity."

To this letter Bruegger replied May 27, 1910, as follows:

Your recent favor to hand and I inclose herewith the note you submitted with my signature attached; of course I confess that although my heart and soul is in the movement, although I think all men of the party should help carry the burden, and although I do not want to shirk my part, I do not like to sign this \$5,000 obligation at present, it may be if my dreams are realized it will not be hard to meet the obligation, but there are so many possibilities to be considered that I feel in submitting this to you I am not following clearly along the lines a man should seek for his continued safety but an occasional plunge may be justified in life, however I would feel much better if I was sure we would have a crop here this year and that my coal mine was operating at a profit and this would only be a joke. In any case I ask for your consideration and co-operation in taking care of this.

(Signed) John Bruegger.

Hollister acknowledged receipt as follows:

I acknowledge receipt of yours of the 27th with contents as stated. I realize the force of all you say more than you imagine. I have been carrying the big end of this burden for two years, and have felt sure that eventually, when the different Democrats of the state would fully understand the facts, I would get relief.

It will probably take a week to get everything lined up so that we know that the newspaper is in the clear, at which time the stock will be issued, and I really believe you will never regret this act.

(Signed) Geo. H. Hollister.

The following letter dated July 19, 1910, was on that date mailed to Bruegger. It contained a certificate of fifty shares of the par value of \$100 each, filled in to John Bruegger, signed by Hollister as President and McAndress as Secretary of the News Printing Company, bearing date of issue as May 30, 1910. This letter reads:

I inclose you herewith certificate for fifty shares of the preferred stock of the News Printing Company, paid by your note some time ago. This has dragged along some time waiting for others to come along. I wish that everyone was as prompt with their fulfilment of

promises as you are. Some of these fellows are long on promises and mighty short on fulfilments.

(Signed) Geo. H. Hollister.

On August 9th Bruegger writes Hollister asking assistance for some newspaper at Rugby to which Hollister replied that "I presume that during the next sixty days I could arrange for the loan referred to, provided the security was sufficient. However, our people would demand personal endorsement sufficient to take care of the obligation regardless of the security which the Rugby people could pledge." This Rugby letter is of little importance, but is inserted to complete the correspondence. On August 17, 1910, unsolicited except by the foregoing events, Bruegger received the following letter from Hollister:

I am pleased to advise you that I have made a turn in the newspaper that bids fair to protect everybody interested. Mr. McArthur found responsible parties to take over the business management and put in capital stock enough, with what we had, to put the proposition in fairly good shape, and I hasten to write you that you may not be worrying unduly over your part in the transaction.

I understand, at least for the present, Mr. McArthur will be in control of the policy, and I know that your particular interests will not suffer. Our mutual friend Kelly has had another spasm of talking big and meaning and doing nothing, but as he has done so many times before, flattered himself that he was fooling us all, but with what object, I am unable to fathom. I am quite well satisfied with the present situation and believe that the business will go on and prosper.

(Signed) Geo. H. Hollister.

Bruegger replied as follows:

'August 23rd, 1910.

Yours of the 17th inst. duly received. Replying to same wish to state that I fully appreciate the contents of your letter and feel grateful to you, as the times this year are not intended to encourage a man much (especially in this locality where a community is not yet fully established) to any great new ventures.

I hope things will be pleasant and agreeable in the organization, and that Mr. McArthur will meet with deserving success. He certainly has my best wishes, and I want to assure you that I will at all times be ready to back him up to the best of my ability, in all things that he might venture in.

Once more I wish to thank you for the course that is being pursued, and with best wishes, I remain

Yours very truly,

(Signed) John Bruegger.

Shortly after November 18, 1910, Bruegger received written notice from the Northern Trust Company that his note for \$5,000, aggregating with interest \$5182.25, would be due on December 1st, 1910. To this Bruegger replied by letter under date of Nov. 21st, as follows:

Notice of due date for note having been mailed me, as Dec. 1st, I write to ascertain if it will be possible for you to accept my offer; viz., to pay you \$500 and return the bond for the surrender of my note. I assure you I would feel greatly relieved should you be able to favor me to this extent. If not I would like to renew as follows: \$1,000 Feb. 1st, 11, and \$4,000 1 year. After going through a hard and expensive campaign it will worry me to make any payment on this note at this time.

(Signed) John Bruegger.

Hollister then inclosed Bruegger blank notes for renewal, with the following letter:

November 26, 1910.

We are in receipt of yours of the 21st.; in reply will say that, as I have always told you, this claim can be paid almost at your pleasure; we do not care to take the position of forcing it, knowing that you will do all that you can at all times. I inclose you herewith notes in renewal,—one for \$1,000, due February 1st, and the other for \$4,000, due in one year. If you will sign these and return to us with a check for the interest, the matter can run along.

In the meantime, I will watch every chance to spread this liability over others, but as it stands now, both Hellstrom and McAndress are

attempting to shoulder all the loss at this end on me. Whether they succeed or not can only be told by the courts, but should there be any chance, you may depend upon it I will relieve you to the extent of my ability.

(Signed) Geo. H. Hollister.

Twice during the summer Bruegger had been in Fargo and had discussed the newspaper venture with Hollister in a general way, but not going into details. He says that he did not learn how Hollister had, to quote his words, "made the turn in the newspaper." Hollister, on the contrary, claims that he explained the situation fully to Bruegger, who assented thereto.

The newspaper's financial difficulties were handled by Hollister. \$2700 in notes and cash over Bruegger's note, making \$7,700 in all, had come into Hollister's possession as a result of the Grand Forks meeting. One of these was a note of \$500 given by John Carmody, mentioned because error is predicated upon the admission of proof that the same had been sued upon, and is referred to later. Kelly's subscriptions of over \$10,000 was not turned over to Hollister, and hence not involved with the \$7,700 in notes and paper indorsed to the News Printing Company. The balance of the \$50,000 issue of bonds over the \$12,000 paid in January was taken by the Northern Trust Company in July, 1910. Thus the note to Bruegger, claimed by him to have been given as a subscription, to be delivered only upon condition that \$50,000 was realized from sales of stock of the News Printing Company, was not held to await such a condition never happening, but instead was applied as a campaign contribution upon the debts of the News Printing Company to the Northern Trust Company. Hollister, as president of the News Printing Company, indorsed Bruegger's note by a general indorsement and delivered it to the Northern Trust Company, who indorsed it without recourse to the Northern Savings Bank. It instituted this action against Bruegger, who answered, denying liability on the note. It reindorsed the note back to the Trust Company, who then was substituted as plaintiff in lieu of the Northern State Bank, dismissed from the suit, and this action continued under the present amended pleadings against both Bruegger and the News Printing Company, defendants.

In August, 1910, a sale was made of this newspaper to one Colwell, a friend of McArthur. Transfer was made of the News Printing Company's stock by the three holders of it to Colwell. This was the "turn in the newspaper" referred to by Hollister in his letter to Bruegger of August 17. The newspaper lost money steadily and heavily. On October 31, 1910, suit was commenced to foreclose the \$50,000 bond issue only recently sold in July. The default was in failure of the new owner to keep the property insured and pay the Associated Press franchise fee. Kelly, on behalf of the Democrats, answered in this foreclosure, and in order to keep the control of the newspaper until after the November election agreed to pay all expenses of running the paper, and that judgment might be entered on the foreclosure after the election. Judgment was entered accordingly November 15, 1910, and on November 26, the property sold on foreclosure was bid in for the bondholders, the principal one of which was the Northern Trust Company.

Bruegger testifies he was in ignorance of the details and facts concerning the foreclosure, but heard of it incidentally soon after election, but supposed his liability on his note would be taken care of, believing that other subscriptions to the amount of \$50,000 had been taken and used by Hollister in swinging the deal, and that accordingly he would "get some credit upon his note" from the proceeds of that sale. Bruegger says that prior to that time he had made an appointment with Hollister to go over the financial condition of the newspaper and plant with him, but that Hollister failed to keep his appointment, and Bruegger returned home. So instead of answering Hollister's letter of November 26, 1910, inclosing blank renewal notes, Bruegger delayed further action until he could meet Hollister at a Democratic banquet that was to be held in December. He saw Hollister, though of this he testifies: "I asked about how much credit that I should get on my note from the proceeds of the foreclosure, and he told me there would be none. I wanted an explanation. He stated that the proceeds of the mortgage foreclosure went to the bonds, in which I was not interested. That I had preferred stock, and both the preferred and common stock wouldn't realize anything out of this sale. I then looked up to him and said to him that 'this is the rawest deal I ever run up against.' He stated or asked, 'I hope this won't make

any difference in our friendship,' to which I replied, 'That remains to be seen,' and went out of the office." He further testifies: "I offered \$500 and to surrender the stock and take my note" sometime in August after the receipt of Hollister's letter of August 17th, stating he had made a turn in newspaper "that bids fair to protect everybody's interests." But Hollister refused that offer. This is Bruegger's explanation of why he renewed such offer in his letter of November 21st.

The foregoing facts present Bruegger's side of the controversy. Hollister denies any knowledge of Kelly's circular letter or that the committee appointed at the meeting was to solicit subscriptions, or that any notes taken should be retained until \$50,000 or any particular amount of subscriptions should be taken; and claims that by using the notes and subscriptions to turn the newspaper deal as he did by having the Trust Company and the others take the bonds and pay the balance of the indebtedness owing by the newspaper and releasing the thirty guarantors of the prior bonds, and their surrender on the acceptance of the last issue, and by turning the plant over to Colwell, he, Hollister, had performed his part of the engagement as he had understood it. He claims the correspondence alone establishes that to have been the understanding under which the note was delivered, and that it was error to receive in evidence what was said and done by Kelly and McArthur to Bruegger. He also denies the substance of McArthur's testimony as to the phone conversation. All the testimony of Bruegger, Richards, and Kelly as to their understanding of what was done at the Grand Forks meeting was received under objections as to its admissibility for any purpose.

Questions of law involved will now be discussed. The theory of Bruegger's defense under his proof was that there never had been delivery by the escrow holder, Hollister, of Bruegger's note delivered in escrow to him, and that the note never had been delivered because the conditions precedent to its delivery, *i. e.*, the sale of an additional \$45,000 worth of stock besides that taken by Bruegger, had never been brought about, and that the note in legal effect had never been delivered, and was void *ab initio*. The plaintiff denied that a delivery in escrow had been contracted for or was understood, and alleged that the note had been delivered to Hollister unconditionally and had been transferred to plaintiff for value in due course and without notice

of any defenses; that though it should be found that the note had been delivered in escrow, yet defendant had been informed of its use and knew that it had been used, and had acquiesced and consented therein, and was estopped by his acts and conduct to assert nondelivery as a defense. Defendant has denied knowledge of such facts asserted to have been known by him, and alleged a wilful concealment by Hollister from him as inducing any nonaction and seeming acquiescence.

Each party had the right to make proof along the line of the claims asserted in the pleadings and on the trial. Examination of the letters transmitting the note for signature and returning it signed discloses reference to prior negotiations had between McArthur, Kelly, Bruegger, and Hollister, and that representations had been made by McArthur to Hollister of "the substance of the conversation between you (Bruegger), Kelly, and himself (McArthur)," and that McArthur had communicated that conversation to Hollister by phone. Also that there was a "proposition they were working on" and a "turn" to be made and to be "money raised" for "subscriptions" to be obtained and "held" "until there are enough in to turn the deal before using any of it, and that is the system we are adopting." This is ample to constitute a foundation upon which the parties therein mentioned should be permitted to testify in explanation of the matters referred to in said letter. In fact, under the assurance contained in the letter that the note "will not be used until the deal is turned and money raised to put the paper in the clear," coupled with the reference to the agreement or understanding between McArthur and these people, all the testimony offered on that subject was admissible. Under no circumstances could it be claimed that the letter constituted the entire contract under which the note was executed and transmitted. The letter conclusively refutes that contention. In fact, without other evidence it is impossible to tell what the proposition or deal to be turned was or the amount of subscription or to what or how it was to be applied or the amount of money to be raised necessary to put the paper in the clear. And Bruegger's reply is equally blind unless read in the light of the prior events disclosed by the proof. When so considered it is understandable. His statement that "I think all men of the party should help carry the burden, and although I do not want to shirk my part I do not like to sign this \$5,000 obligation at present. It

may be if my dreams are realized it will not be hard to meet the obligation, but there are so many possibilities to be considered that I feel in submitting this to you I am not following clearly along the lines a man should seek for his continued safety. But an occasional plunge may be justified in life. . . . I ask for your consideration and co-operation in taking care of this,"—showed he had misgivings and felt that there was some risk, some liability, but intrusted the note to Hollister to start the subscription off.

Testimony explanatory of these letters was properly admissible and is ample to sustain a finding of a delivery in escrow. And the jury must have so found before the verdict for the defendant under the instructions could have been returned. That the note was delivered in escrow and upon said condition as to second delivery must be taken as established by the verdict. Hence Bruegger should prevail under such defense, unless the jury were warranted in finding that he was estopped from asserting it. If this defense was properly submitted, the findings thereon are conclusive upon controverted *fact*. And the only facts in dispute concern the knowledge of Bruegger of the use made of his note and of whether he knew that \$50,000 of subscriptions for capital stock had not been realized, and, knowing these facts, either had released the condition and authorized the use of his note, or by his nonaction when he should have acted is estopped to assert his defense because the other party had meanwhile, and in reliance upon his conduct and consent to the use of the note, changed its position to its disadvantage, prejudice, or injury, so that to allow the defense of nondelivery would operate as a fraud upon it.

An examination of the correspondence subsequent to the delivery of the note and up to and including Bruegger's letter of November 21st containing the offer to renew this \$5,000 obligation contains nothing which in itself can be held as a matter of law to constitute an estoppel against Bruegger. Any possible estoppel arising from such correspondence must be predicated upon Bruegger's last letter. It may be assumed that such letter would constitute an estoppel against him had it been written with full knowledge of everything transpiring previously thereto. But the jury have found that Bruegger did not have such knowledge, as under the instructions to have found for him it must have found that Hollister had concealed from Bruegger

"the fact that sufficient of the stock of the News Printing Company had not been sold to take up all the outstanding obligations existing at the time Bruegger's note was transferred to the Northern Trust Company," quoting from instructions on this point.

This finding of ignorance by Bruegger of true conditions must be adopted as it must have been so found, otherwise under the instructions the jury could not have found for Bruegger. And once Bruegger's ignorance of the facts are conceded, it is also established thereby that the condition attached to the escrow agreement has neither been waived nor released, as the same could only have been done with full knowledge of the facts to be binding upon Bruegger.

That the trust company is the owner of the note does not change the situation. Hollister was its president, and the very letter of May 25, 1910, soliciting Bruegger's signature to the note, is that of the Northern Trust Company, by "Geo. Hollister, President." No other construction can be given than that the plaintiff is the "*we*" mentioned in "*we*" are working on the proposition, . . . and that is the system we are adopting. . . . We are making arrangements for a systematic sale of the stock, . . . and *we* believe *we* can sell stock enough to get along without any bonds at all. . . . This company will be glad to loan you at least one half of it if you so desire in renewal, for this note will probably be indorsed over to this company in the meantime, so *we* will undoubtedly own it at maturity, . . . and that is the system *we* are adopting." In any event full notice and knowledge of all defenses are imputable to the Trust Company from the knowledge and acts of its president in the premises. *McCarty v. Kepreta*, 24 N. D. 395, 48 L.R.A.(N.S.) 65, 139 N. W. 992, Ann. Cas. 1915A 834; *Grant County State Bank v. North West Land Co.* 28 N. D. 479, 150 N. W. 736. Every defense available against the News Printing Company can be asserted against plaintiff.

Delivery in escrow, however, was made to Hollister, not to plaintiff. Hollister was the person McArthur arranged Bruegger should deposit his note with, and Bruegger did so. Consult his letter to Hollister transmitting his note. Plaintiff company was unknown to McArthur in this deal.

Numerous objections were taken on the trial to evidence offered

tending to show that at the time Bruegger's note was used and at all times thereafter the stock was worthless, and that the newspaper, operated at a loss, did not increase its assets. All this as proof tended to establish the defense and counterclaim based on the wrongful delivery of the note, and that the fraudulent concealment of facts by Hollister from Bruegger damaged him to the full sum due on the note. At the time this kind of proof was offered it bore upon an issue presented by the pleadings and was admissible.

At the close of defendant's main case plaintiff's counsel moved that Bruegger be required to state "upon which theory they were proceeding in this case, whether upon the theory of rescission or affirmance of the contract." Thereupon Attorney Engerud stated that no question of rescission was involved, but, instead, the defense was whether the note was delivered in escrow, and if so, whether such defense could be asserted, and that no rescission was claimed. The statement was correct. The error assigned upon the denial of a motion for an election of defenses is not well taken.

Error is assigned, but not argued, upon the proof offered and received concerning the Carmody note and another for \$200. This assignment is abandoned, and not argued in the brief. But in any event it is apparent that the testimony bore upon the issues as disclosing whether the plan of selling stock was being carried out. Likewise the corporate books and the circular letter offered and received were admissible for the same reasons. Nor did the court err in requiring a new answer from defendant after it had allowed substitution of the trust company as plaintiff, in lieu of the Northern Savings Bank, instituting this action.

Counsel for defendant in the course of argument to the jury made a statement in effect that the reason why the News Printing Company had been joined as a codefendant with Bruegger was to get the latter "down into this part of the state where he is comparatively little known," or where he "wasn't so well and favorably known as among his neighbors and acquaintances there in Williams county where he lives." To the objection taken the trial court stated that "in overruling the objection the court states in the presence of the jury that the plaintiff had a legal right to make the News Printing Company a party defendant in this action, argumentatively however, counsel

for defendant can proceed." The argument made was of doubtful propriety, and the court should have sustained the objection and cut off argument of that kind under the facts disclosed by the record. However, it was not prejudicial error warranting granting of a new trial.

Error is assigned upon instructions given and refused. There is no prejudicial error upon that score. The only exception argued to instructions given is that "the court did not in any manner instruct the jury on the measure of damages applicable in this case, and failed to in any manner instruct the jury on the question of rescission or affirmance of the transaction." The instructions in the main were correct and unchallenged. After defining the issues, the court started to instruct upon the question of damages arising from concealment, evidently confusing the issues proper to be submitted under the proof at the close of the case with those tendered by the pleadings. As no issue of damages was involved, there was no error in failing to instruct upon a defense abandoned. Defendant relied instead upon the sole defense of breach of the escrow agreement. No question of affirmance or rescission was involved.

Error is predicated upon refusal to instruct as requested that "a contract which is voidable solely for want of due consent may be ratified by a subsequent consent." This had no place in the instructions. It was beyond the scope of the proof. It would have been confusing when injected into a consideration of whether there was an escrow agreement, and if so whether it was complied with or compliance waived. The escrow agreement was a contract. No question arose as to its voidability. It was valid if it was made. Estoppel to claim it is a different matter entirely.

Error is assigned and argued upon failure to instruct as requested "that a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it so far as the facts are known or ought to be known to the person accepting" (Comp. Laws 1913, § 5866), and counsel argues that Bruegger had constructive knowledge, *i. e.*, he had the possession of such information and had such opportunities to acquire knowledge of that particular (the bond issue and the payment of debt from its proceeds), that he "ought to

have known it," and thus, having acquired the stock and the political support of the paper, he should be held under that statute "to have consented to all the obligations," and must pay the note, and that "nowhere does the court submit to the jury the question whether Bruegger, from all the evidence, ought to have known of the bond issue and the payment of the debts in that manner." Counsel's whole argument assumes that some duty rested upon Bruegger to investigate and know that Hollister was violating his contract contained in the escrow agreement. Bruegger was under no such obligation. If he delivered this note under that agreement, and the jury found he did, he could have gone to South Africa without waiving any right of his to insist upon full compliance and strict performance by Hollister and the News Printing Company of the escrow agreement. Such performance was a condition precedent on the part of payee to a delivery of the note. The same rules apply to the delivery of a promissory note as to a deed. The condition precedent to the delivery, that is, the second delivery by the escrow holder, must be performed as a condition precedent to the validity of the instrument. There can be no middle ground or partial compliance sufficient as a substantial performance of the escrow agreement. Strict and full performance only can discharge the condition precedent to valid delivery by the escrow holder. *Thornhill v. Olson*, 31 N. D. 81, L.R.A.1916A, 493, 153 N. W. 442.

The further exception is taken based upon a refusal to instruct that "if Bruegger had knowledge of the facts when he wrote the letter of November 21, 1910 (offering to renew the note), he thereby ratified the transaction, and cannot now defend against the note." The same question was raised on denial of a motion for a directed verdict. The instruction was properly refused because Bruegger, shortly before the writing of this letter, might have learned the facts and thereupon written plaintiff as he did without ratifying the violation of the escrow agreement and estopping himself to assert that defense, inasmuch as the positions of the parties were in no wise changed subsequent thereto or to the plaintiff's injury or disadvantage in reliance thereon. If the written promise to pay contained in the original note did not bind Bruegger, the mere offer to renew, soon afterward repudiated, did not

estop him under the circumstances in this case. On this question the instructions of the court were more favorable than plaintiff was entitled to, and error was committed against Bruegger.

Plaintiff contends that it discharged the first mortgage and guaranty under the belief that Bruegger's note should be used as it was used. This however does not estop defendant because, concededly, he had done nothing at that time, July, 1910, upon which to base an estoppel against him. He knew nothing of the fact as found by the jury, of Hollister's violation, shortly prior thereto, of the escrow agreement. And the same is true of his acceptance and retention of the shares of stock transmitted him about the same time, and of any political support rendered him by the newspaper.

The court denied a new trial on alleged newly discovered evidence; the evidence offered is not newly discovered and was either a rehearsal of Hollister's testimony and claims at the trial and merely cumulative and what defendant's witnesses have testified to, or should have been inquired of at the trial. McAndress, whose affidavit is relied on for a new trial, was one of the witnesses testifying on two different days at the trial. A new trial should not be granted simply because a defeated party has failed to offer all the proof he had at hand. The point is without merit.

Error is assigned because of denial of plaintiff's motion to direct judgment against the News Printing Company and thus eliminate from the case the consideration of the liability of the News Printing Company. This objection is trivial and technical. What plaintiff asked in effect was done and plaintiff's motion was granted by the instructions to the jury to return a verdict against the News Printing Company in any event, as was done.

After a careful review of alleged error assigned, none warranting a reversal is found. The judgment is ordered affirmed.

FISK, Ch. J., disqualified. HON. W. C. CRAWFORD, District Judge, participated.

**J. J. BEHLES v. MAURICE DUFFY, as Administrator of the
Estate of Mary Duffy, Deceased.**

(150 N. W. 838.)

Action to recover on an alleged promissory note for \$2,500 of Mary Duffy, which defendant claims she never executed, and to be a forgery. *Held:*

Promissory note — action on — execution — forgery — evidence — genuineness of note.

1. The evidence is sufficient to sustain the finding of the trial court that the instrument is not the note of Mary Duffy, but was written in over her signature.

Production of note — by plaintiff — completeness of note — no evidence of — nor presumption of law — proof — inferences therefrom.

2. No presumption of law applies that, from plaintiff's production of the note in complete form, with her signature underneath it, that it was complete, and such when delivered as against inferences under the proof.

Note — complete in form — delivery of — possession of — presumption of law — proof.

3. There is no presumption of law that she delivered the note in complete form or at all under the proof.

Circumstances — inferences from — alteration of note — facts — issues for jury.

4. All inferences from the circumstances proved, including the alteration apparent upon the face of the instrument when examined under a microscope, are of fact and for the determination of the jury as issues of fact.

Opinion filed October 10, 1916.

An appeal from the District Court of McLean County, NUESSELE, J.
Affirmed.

H. F. O'Hare, for appellant.

The defense here is forgery, and evidence as to the financial standing of the parties was introduced to prove the probability of the defendant having signed the note. Such evidence is not admissible. *Bridge-man v. Corey*, 62 Vt. 1, 20 Atl. 273; *Pettiford v. Mayo*, 117 N. C. 27, 23 S. E. 252; *Taylor v. Gale*, 14 Wash. 57, 44 Pac. 110; *Bliss v. Johnson*, 162 Mass. 323, 38 N. E. 446; *Martin v. Knight*, 147 N. C. 564, 61 S. E. 447; *Hymian v. Kirt*, 153 Mich. 113, 116 N. W. 536.

Plaintiff made out a prima facie case by proving the signature on the note and the last indorsement, and the offer of the note in evidence. *Kerr v. Anderson*, 16 N. D. 36, 111 N. W. 614; *Dan. Neg. Inst.* 812; *Shepard v. Hanson*, 9 N. D. 249, 83 N. W. 20, 10 N. D. 194, 86 N. W. 704; *Tapia v. Baggett*, 167 Ala. 381, 52 So. 834; *Barnes v. Spencer & B. Co.* 162 Mich. 509, 139 Am. St. Rep. 587, 127 N. W. 752; *Johnson County Sav. Bank v. Koch*, 38 Pa. Super. Ct. 553; *Stouffer v. Kelchner*, 38 Pa. Super. Ct. 475; *De Leon v. Walters*, 163 Ala. 499, 50 So. 934, 19 Ann. Cas. 914; *Jackson & S. Traction Co. v. Green*, 93 C. C. A. 272, 167 Fed. 806; *Olson v. Day*, 23 S. D. 150, 120 N. W. 883, 20 Ann. Cas. 516; *McKeand v. Feinberg*, 145 Ill. App. 274; *Walsh v. Allen*, 6 Colo. App. 303, 40 Pac. 473; 8 Cyc. 69, 71, under note 23.

The burden of proof is on the party pleading want or failure of consideration. *Keelyn v. Strieder*, 148 Ill. App. 238; *Ewen v. Templeton*, 148 Ill. App. 46; *Speeler v. Heil*, 77 N. J. Eq. 592, 78 Atl. 692; *Taylor v. Taylor*, 138 Mich. 658, 101 N. W. 832; *American Nat. Bank v. Lundy*, 21 N. D. 167, 129 N. W. 99; *Columbian Bkg. Co. v. Bowen*, 134 Wis. 218, 114 N. W. 451.

So, in pleading fraud or forgery. *Brokaw v. McElroy*, 162 Iowa, 288, 50 L.R.A.(N.S.) 835, 143 N. W. 1087; *Toledo, S. & M. R. Co. v. Peters*, 177 Mich. 76, 143 N. W. 18; *National German American Bank v. Lang*, 2 N. D. 66, 49 N. W. 414; *First Nat. Bank v. Laughlin*, 4 N. D. 391, 61 N. W. 473; *Seybold v. Grand Forks Nat. Bank*, 5 N. D. 460, 67 N. W. 682; *Ravicz v. Nichells*, 9 N. D. 536, 84 N. W. 353; *Vickery v. Burton*, 6 N. D. 245, 69 N. W. 193, and cases cited; *Gawthorpe v. Clark*, 173 Mich. 267, 138 N. W. 1075; *Fordyce v. Humphrey*, 152 Iowa, 76, 131 N. W. 686; *Blakesburg Sav. Bank v. Burton*, 156 Iowa, 671, 137 N. W. 916; *First Nat. Bank v. Fulton*, 156 Iowa, 734, 137 N. W. 1019.

It must be shown that the forgery by alteration took place after execution and delivery. *Bailey v. Taylor*, 11 Conn. 531, 29 Am. Dec. 321; *Hunt v. Gray*, 35 N. J. L. 228, 10 Am. Rep. 232; *Gooch v. Bryant*, 13 Me. 386; *Crabtree v. Clark*, 20 Me. 337; *Neil v. J. I. Case & Co.* 25 Kan. 510, 37 Am. Rep. 259; *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775; *Davis v. Jenney*, 1 Met. 221; *Cass County v. American Exch. State Bank*, 9 N. D. 263, 83 N. W. 12; *Dorsey v. Conrad*, 49 Neb. 443, 68 N. W. 645; *Lachemmaier v. Hanson*, 116

C. C. A. 397, 196 Fed. 773; *Pastene v. Pardini*, 135 Cal. 431, 67 Pac. 861; *Griswold v. Davis*, 31 Vt. 390; *Woodford v. Dorwin*, 3 Vt. 82, 21 Am. Dec. 573; *Garrigus v. Home, Frontier & F. Missionary Soc.* 3 Ind. App. 91, 50 Am. St. Rep. 262, 28 N. W. 1009; *Knapstein v. Tinnette*, 156 Ill. 322, 40 N. E. 947; *Winfrey v. Ragan*, 136 Mo. App. 250, 117 S. W. 83; *Gandy v. Bissell*, 72 Neb. 356, 100 N. W. 803; 1 Dan. Neg. Inst. ¶ 812, p. 962, and notes cited there; *Cranson v. Goss*, 107 Mass. 439, 9 Am. Rep. 45; *Sinclair v. Baggaley*, 4 Mees. & W. 312, 150 Eng. Reprint, 1448, 7 L. J. Exch. N. S. 305, 1 Horn & H. 294, 2 Jur. 283; *Anderson v. Weston*, 6 Bing. N. C. 296, 133 Eng. Reprint, 117, 8 Scott, 583, 9 L. J. C. P. N. S. 194, 4 Jur. 105; *Emery v. Vinall*, 26 Me. 295; *Churchill v. Gardner*, 7 T. R. 596, 101 Eng. Reprint, 1151; *Smith v. McClure*, 5 East, 477, 102 Eng. Reprint, 1153, 2 Smith, 43, 7 Revised Rep. 750; *Exchange Bank v. Veirs*, 3 Cal. App. 71, 84 Pac. 455; *Binney v. Plumley*, 5 Vt. 500, 26 Am. Dec. 313.

Possession of note by payee, or other person aside from maker, is *prima facie* evidence of delivery. *Bellows v. Folsom*, 4 Robt. 43; *Stouffer v. Curtis*, 198 Mass. 560, 85 N. E. 180; *Carrigus v. Home, Frontier & F. Missionary Soc.* 3 Ind. App. 91, 50 Am. St. Rep. 262, 28 N. E. 1009; *Gandy v. Bissell*, 81 Neb. 102, 115 N. W. 571, 117 N. W. 349; *Massachusetts Nat. Bank v. Snow*, 187 Mass. 159, 72 N. E. 959.

And such possession raises the presumption of ownership. *Home Sav. Bank v. Stewart*, 78 Neb. 624, 110 N. W. 947; *Hurt v. Ford*, — Mo. —, 36 S. W. 671; *Hodge v. Smith*, 130 Wis. 326, 110 N. W. 192; *Allison v. Hollembeak*, 138 Iowa, 479, 114 N. W. 1059; *Hall v. Wortman*, 123 Mich. 304, 82 N. W. 50; *Baumeister v. Kuntz*, 53 Fla. 340, 42 So. 886; *Montvale v. People's Bank*, 74 N. J. L. 464, 67 Atl. 67; *Colborn v. Arbecam*, 54 Misc. 623, 104 N. Y. Supp. 986; *Moak v. Stevens*, 45 Misc. 147, 91 N. Y. Supp. 903; *Poess v. Twelfth Ward Bank (Check) semble*, 43 Misc. 45, 86 N. Y. Supp. 857; *Greaser v. Sugarman*, 37 Misc. 199, 76 N. Y. Supp. 922.

The character of negotiability having been voluntarily conferred on an instrument by the maker, it cannot be destroyed except by the act of a holder in limiting its payment, by proper insertion to himself or some other person. 3 R. C. L. p. 840, Bills & Notes, § 14; Man-

hattan Sav. Inst. v. New York Nat. Exch. Bank, 170 N. Y. 58, 88 Am. St. Rep. 640, 62 N. E. 1079; Holliday State Bank v. Hoffman, Ann. Cas. 1912D, 11, note.

The verdict here should have been set aside and a new trial ordered, as a matter of sound discretion in the trial court. *Meehan v. Great Northern R. Co.* 13 N. D. 432, 101 N. W. 183; *Richmire v. Andrews & G. Elevator Co.* 11 N. D. 453, 92 N. W. 819; *Johns v. Ruff*, 12 N. D. 74, 95 N. W. 440; *West v. Northern P. R. Co.* 13 N. D. 221, 100 N. W. 254; *Nelson v. Grondahl*, 12 N. D. 130, 96 N. W. 299; *Etna Indemnity Co. v. Schroeder*, 12 N. D. 110, 95 N. W. 436; *Schumacher v. Great Northern R. Co.* 23 N. D. 231, 136 N. W. 85.

J. A. Hyland and R. L. Frazer, for respondent.

In an action on a note the execution of which is disputed, it is competent to offer evidence as to the financial dealings of the parties to show the probability or improbability of the execution of the note. 8 Cyc. 259; *Nickerson v. Gould*, 82 Me. 512, 20 Atl. 86; *Gitchell v. Ryan*, 24 Ill. App. 372; *Bliss v. Johnson*, 162 Mass. 323, 38 N. E. 446.

When persons occupy a relationship of trust and confidence, as here shown, the court will scrutinize their dealings very carefully. *Fjone v. Fjone*, 16 N. D. 100, 112 N. W. 71.

The presumption is that material evidence withheld by the plaintiff would be against him. *Tabor v. Fox*, 56 Iowa, 539, 9 N. W. 897; *Lauer v. Banning*, 152 Iowa, 99, 131 N. W. 783; 16 Cyc. 1064; *Dubois v. Baker*, 30 N. Y. 355.

Where execution is denied, the mere possession and holding of the note is not sufficient proof of the due execution and delivery. *Stoddard v. Lyon*, 18 S. D. 207, 99 N. W. 1116.

Where a piece of paper is signed in blank, the party signing cannot be bound to an obligation written in thereafter, unless it is clearly shown that he gave the person who wrote it authority to do so. *Richards v. Day*, 137 N. Y. 183, 23 L.R.A. 601, 33 Am. St. Rep. 704, 33 N. E. 146; *First Nat. Bank v. Zeims*, 93 Iowa, 140, 61 N. W. 483.

The foreign law will be presumed to be the common law in the absence of proof to the contrary, and the validity of the note is governed by the common-law rules. Comp. Laws 1913, § 7936, subsec. 41; *Hanson v. Great Northern R. Co.* 18 N. D. 324, 138 Am. St.

Rep. 768, 121 N. W. 78; Pritchard v. Norton, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102; 8 Cyc. 216.

A statute which, although expressed in terms of evidence, materially affects a contract in existence by taking away a vested right, is unconstitutional. 8 Cyc. 218, 1015; Marsh v. Burroughs, 1 Woods, 463, Fed. Cas. No. 9,112; Hope Mut. Ins. Co. v. Flynn, 38 Mo. 483, 90 Am. Dec. 438.

A non-negotiable note altered after execution so as to make it negotiable is void even in the hands of a bona fide holder, unless consent to the alteration is clearly shown. Porter v. Hardy, 10 N. D. 551, 88 N. W. 458; Maguire v. Eichmeier, 109 Iowa, 301, 80 N. W. 395; Robinson v. Reed, 46 Iowa, 219; Shroeder v. Webster, 88 Iowa, 627, 55 N. W. 569.

An ancillary administrator has no authority to allow and pay claims of residents of the state in which the principal administration was granted. Shegogg v. Perkins, 34 Ark. 117; Churchill v. Boyden, 17 Vt. 319; Hunt v. Fay, 7 Vt. 170; Aspden v. Nixon, 4 How. 467, 11 L. ed. 1059; Ponderson v. Avery, 1 Root, 103.

The allowance or rejection of a claim is binding upon the estate and claimant, although strictly speaking it is not a judgment. La Porte v. Organ, 5 Ind. App. 369, 32 N. E. 342; Livermore v. Haven, 23 Pick. 116; 18 Cyc. 492; Floyd v. Clayton, 67 Ala. 265; Wernse v. McPike, 100 Mo. 476, 13 S. W. 809.

A complaint which alleges interest payable annually is not supported by offering in evidence a note providing for interest, but not payable annually. Viets v. Silver, 15 N. D. 51, 106 N. W. 35.

Goss, J. This is an action against the administrator, Maurice Duffy, to recover of the estate of Mary Duffy \$2,500 and interest upon an alleged promissory note given by her to one Rev. Wm. H. Sheran, and purchased by plaintiff from Sheran after its maturity.

The answer denies the execution and delivery of the note, and alleges "that the said Sheran fraudulently executed said note in his favor, and that, if the signature of Mary Duffy is signed to said note, that the same was obtained by fraud, and not otherwise." The trial court adjudged the note invalid because of forgery. Sufficiency of the evidence to sustain this finding is challenged. If there is com-

petent evidence to sustain that finding the case is concluded against appellant.

The note was written upon a portion of a blank sheet of narrow white paper. It is almost square. The body of the note reads:

Plentywood, Montana.

Aug. 1st, 1909.

One year from date, for value received, I promise to pay the Rev. Wm. H. Sheran or order the sum of twenty-five hundred dollars (\$2,500), with interest at the rate of seven per cent, before and after maturity.

Mary Duffy.

/ It is admitted that the entire note above the words, "Mary Duffy," is in the handwriting of Sheran. Also that the words, "Mary Duffy," are in her handwriting and are her genuine signature. There are two folds lengthwise across the paper and through the handwriting. The last word, "maturity," is written as the last line, and is crowded in above the first word of the signature, the upper part of the letter "M" of the word "Mary" of the signature crosses the word "maturity," and the word "seven" in the line immediately above the word "maturity." The signature is with a different and lighter ink than that in which the rest of the note is written. Across the back of the note also admittedly in the handwriting of Sheran appearing as an indorsement thereon are the words: "One year's extension granted. Due Aug. 1, 1911. To be paid at Farmers Bank, Garrison, N. Dak.," in apparently the same ink with which the body of the note is written. And underneath this indorsement is a second indorsement in different ink, but also in the handwriting of Sheran. "One year's interest due on this note August 1st, 1911," and underneath is still another indorsement, "Pay to the order of J. J. Behles, without recourse," in different handwriting, followed by the genuine signature and indorsement of "Rev. Wm. H. Sheran."

Mary Duffy died in Iowa in 1911, at the home of her sister Mrs. Ella Fogarty. This note was presented for allowance November 29, 1911, to Maurice Duffy, the administrator for the estate in probate court in Livingston county, Illinois, by Sheran, as a claim against

the estate of Mary Duffy. Its payment was refused by the administrator under the claim that the note was a forgery. That court set a date for hearing on the issue so joined, whereupon Sheran asked withdrawal of the claim without prejudice. This the administrator opposed, but withdrawal was allowed. Sheran then presented it as a claim against her estate, to defendant administrator in ancillary administration, in McLean county, North Dakota, where she owned land. Sheran does not testify. He has left this country and is in Oxford, England.

Mr. Marshall D. Ewell, author of Ewell's Medical Jurisprudence and an expert of National reputation in handwriting and kindred subjects, after an examination of the note under a microscope, has testified that the body of the note was written after the words "Mary Duffy" had been affixed to the paper upon which the note is written. He has detailed his reasons, that where the words in the body of the note are written across the portion of the signature, the writing carries through that of the signature, showing that the signature was then dry and was made first, and these words of the body of the note written over it. An examination under the microscope verifies this statement, and the further one, that certain portions of the signature were written across a fold in the paper after the paper had been folded, broadening the lines. The position of the signature with reference to the rest of the note, and that the body of the note seems crowded in above it in economizing space, is also significant. The paper appears to be a cut-off portion of the sheet of notepaper, as is evident from the margin in which an irregularity appears, caused by cutting with a sharp instrument from the balance of the sheet.

There is also in evidence the fact that about the time the note bears date Mary Duffy was not in need of money, but instead had means. The plaintiff, a banker at Garrison, North Dakota, testifies that "she had notes with us for collection, and she had drafts and cashier's checks against our bank, and at other times she had money in and on time certificates, interest-bearing time certificates. She probably had for six months or a year, but not all the time."

It is proved that Sheran was hard up financially during the period from April, 1909, until August 12, 1909, after the date of the note. In July, 1911, in Montana, Ella Fogarty found four or five of Sher-

an's own letters in his handwriting in a trunk belonging to Mary Duffy at her home. This was after her death. In a letter of April 24, 1909, Sheran states: "I am sorely in need of an immediate payment" of some money he claimed due. Again on May 30, 1909, he wrote Mary Duffy on a business deal, from Plentywood, Montana, stating, "I have only \$250, and I am afraid it will not be enough." On August 12, 1909, two weeks after the date of the note, he wrote to Mary Duffy:

I decided to make a call upon my brother with the view to secure from him part payment at least of the note I hold against him. It may be necessary to visit St. Paul and my old home at Waseca, in order to get the required funds to live up there and be in a position to improve my claim. My idea is to have enough in hand to get a team and a cow.

Hoping you will not grow discouraged or lonesome, I remain,

Sincerely,

Wm. H. Sheran.

The admissibility of these letters is objected to, and error is assigned on their reception in evidence. But they would have been admitted in a suit on the note by Sheran against Mary Duffy and under the same issues as a statement against interest, and tending to show his own statement as to his financial condition as a circumstance corroborative of the nonexecution of the note by Mary Duffy. As plaintiff is a purchaser after maturity, and his right to recover is subject to the same defenses, such evidence is admissible in this suit. These letters establish that long prior to and after the date of this alleged note the payee therein was not, in all probability, loaning money, nor in financial condition to have loaned \$2,500 to Mary Duffy. For the same reasons the testimony is admissible of Ella Fogarty, that in April, 1911, three months prior to her death, Mary Duffy had in her possession a promissory note of Sheran to Mary Duffy for \$100, drawn payable one year after date, and at that time past due, establishing that in 1910 or earlier Sheran was owing Mary Duffy \$100. The sister had the note in her possession, and discussed it with Mary Duffy. She showed witness "two or three other notes on other parties." She spoke to her sister about her (Mary's) business affairs. Witness had the Sheran note for \$100 in her hands and read it. A month

later, when "I asked her where that note (of Sheran's) was," she said, "I attended to that." She had previously said to her sister, "This, (Sheran's note) is past due. I don't suppose I will be able to collect it," and she offered it to me. I told her "I would have nothing to do with it," and handed it back to her, and I never saw it afterwards.

These circumstances are strongly corroborative of the contention of the defendant that Mary Duffy had not executed and delivered her note for this large amount to Sheran. And Sheran's default in explanation of the circumstances under which or the consideration for which the note was executed and delivered is a circumstance supporting a conclusion that Sheran's testimony would be unfavorable to plaintiff's recovery. Plaintiff claims that upon the proof as made of the genuineness of the signature of Mary Duffy and the production of the note by plaintiff a *prima facie* case was established, and that he has made thereby *prima facie* proof of the execution and delivery of the note by Duffy to Sheran for a valuable consideration, and that such presumption continues, and that thereunder even though the body of the instrument was written by her upon the paper, yet it must be presumed that the instrument was complete when delivered. Plaintiff contends that it must be presumed that under the proof the note in its present form was delivered by Mary Duffy to Sheran, and that any alteration or additions were made and authorized by Mary Duffy before she delivered it, and that a delivery in its present form must be presumed in law.

(There is no presumption of law as to whether the note was completed as written when delivered, or, on the contrary, altered or forged after completion and delivery.) There is irreconcilable conflict in the authorities as to the extent of and application of presumptions involving alterations of the many classes of instruments. Under some authorities deeds, wills, and commercial paper each constitute different classes with different presumptions to be drawn as to each, from the fact of alteration proved or presumed from the face of the instrument. Jones on Evidence, § 564, at page 685. Concluding discussion of the various presumptions and inferences from the alterations of different instruments, announces a rule that seems sound when applied to the facts in the case at bar. That authority says:

"But whatever conflict of opinion there may be as to the legal presumptions to be raised, there seems to be quite general concurrence in the view that when suspicious circumstances, tending to discredit the document, appear either upon its face or from extrinsic facts, the burden of removing such suspicion is upon the party seeking to use the instrument. There is, however, an indefiniteness about the proper application of the word 'suspicious' as applied to the appearance of the document. In some cases the mere fact of the alteration is held to be suspicious. But this is not supported by any volume of authority. The weight seems to be with those which do not regard the appearance of a change suspicious *per se*.

Sec. 565. There is also general concurrence in the view that the question whether an alteration has been made is a matter to be determined by the jury. Where the instrument is submitted to them, either with or without explanation, the appearance of the document, the possible motive for or against the alteration, the advantage or disadvantage to the party claiming under the instrument which would be likely to follow from an alteration, are all circumstances from which the jury may determine the fact of alteration. And when the person by whom, the time when, or the intent with which, or the circumstances of, consent to an admitted alteration was made, is drawn into question, it is for the jury to say whether it was by a party to the instrument or by a stranger, whether before or after execution, and whether with an honest or a fraudulent purpose. In various jurisdictions, as we have shown, different presumptions exist as to these questions of fact, dependent upon the appearance of the instrument when offered in evidence. But in all of these jurisdictions such presumptions are disputable only, and the question is in the end one for the jury. While there are numerous cases in which it has been held that instruments in which the alteration was manifest from their face, as from difference in ink or handwriting, might be submitted to the jury without any explanation, yet it is clearly the safer and better practice for the person relying on such an instrument to give evidence explaining the same, if possible; and in many cases this has been held indispensable. When the maker testifies that an alteration has been made, it is clearly a question for the jury. When an alteration, after execution, is shown,

it is incumbent on the person claiming under the instrument to prove consent."

Daniel on Negotiable Instruments, 6th ed. § 1421A, states the same rule in these words: "The question as to the burden of proof in respect to alterations is generally affected by all the surrounding circumstances; and one fact or another shifts it to and fro, the jury being left to weigh the testimony and determine the issue with all the lights that can be thrown upon it. Very slight circumstances may operate to shift the burden of proof, and it has been well said by Horton, Ch. J., in Kansas, that 'it is impossible to fix a cast-iron rule to control in all cases.' When all the facts are undisputed some presumption must arise; and that presumption must be conformable to the experience of mankind, and according to what that experience shows to be most probably the truth of the matter. The authorities are every way; and generally each case must rest largely on its own peculiar surroundings."

There is evidence from which a jury might find the facts to be that the purported signature was upon a blank piece of paper, and that the body of the note was thereafter written above it. There is no proof that the instrument was ever presented for payment to the deceased, unless the indorsement placed upon the back of the instrument by the payee in his own handwriting, granting a year's extension, be taken as some evidence thereof, but this on the contrary could be taken as a suspicious circumstance as a secret indorsement made to apparently explain or furnish a reason for not enforcing payment; the existence of the \$100 note on a year's time of Sheran to Mary Duffy and overdue and unpaid in her possession in 1911 is a strong circumstance, as in the usual course of business it would have been surrendered and an indorsement for the amount made upon the larger obligation, the note in suit. The filing of the claim by Sheran and its subsequent withdrawal after issue joined thereon as to its validity after a date set for its trial evidenced a desire to avoid investigation into it; this is strengthened by the assignment to plaintiff, a third person, to present anew in another jurisdiction. All these circumstances, taken in connection with the straightened financial circumstances of Sheran during the summer of 1911 as shown by his own written statements, are sufficient to justify an inference and support

the finding as drawn by the trial court in passing upon the facts that the purported note is not, and never has been, the promissory note of Mary Duffy, and that the action thereon must fall. The judgment therefore is affirmed.

HENRY LEMKE v. ALBERT THOMPSON.

(159 N. W. 844.)

Account stated — action on — defense general denial — instructions — fact — issue of — error.

1. Action upon an account stated, with defense a general denial. Instructions examined and held prejudicial, as withdrawing from the jury determination of a controlling issue of fact.

Account — items of — correctness of admitted — account becomes stated as to — offset — debtor — item not included — future adjustment — defense — general denial.

2. When all items of an account are admitted to be correct except one left for future adjustment, the account becomes stated as to those items agreed to be correct; but the debtor on such partial stated account may offset against it items not included in the stated account, but left for future adjustment. This defense can be maintained under a general denial.

Opinion filed October 10, 1916.

Appeal from the District Court of Ramsey County, *Bultz*, Judge.
Reversed and a new trial ordered.

Frich & Kelly, for appellant.

A witness may not be presented with a written statement, damaging to the adverse party and likely to induce the decision against such party, and be asked to examine same to "refresh his memory" on an immaterial point with respect to which the witness already and correctly testified without having had his memory "refreshed." Further, such written statement is a mere self-serving document, and incompetent as evidence. *Dr. R. D. Eaton Chemical Co. v. Doherty*, 31 N. D. 175, 153 N. W. 966; 10 Cyc. 2449, and cases cited; 11 Enc. Ev. 94 et seq; *State v. Burns*, 25 S. D. 364, 126 N. W. 574.

It is error to admit written memoranda made by plaintiff where he is testifying as a witness in his own behalf and has a distinct recollection of the facts. *National Ulster County Bank v. Madden*, 114 N. Y. 280, 11 Am. St. Rep. 633, 21 N. E. 408; *Coxe Bros. & Co. v. Milbrath*, 110 Wis. 499, 86 N. W. 174.

There is no authority sustaining the practice of reading the memorandum to the jury as a part of a question and then asking the witness if same refreshed his memory. *Haack v. Fearing*, 5 Rob. 528; *Wilde v. Hexter*, 50 Barb. 448; *Garber v. New York City R. Co.* 92 N. Y. Supp. 722; *Western U. Teleg. Co. v. Christensen*, — Tex. Civ. App. —, 78 S. W. 744.

There is no competent proof of an account stated. *Plano Mfg. Co. v. Kautenberger*, 121 Iowa, 213, 96 N. W. 743; *Smith v. Northern P. R. Co.* 3 N. D. 555, 58 N. W. 345; *American Soda Fountain Co. v. Hogue*, 17 N. D. 375, 17 L.R.A.(N.S.) 1113, 116 N. W. 339; *Swanson v. Andrus*, 84 Minn. 168, 87 N. W. 363, 88 N. W. 252; *Decen. Dig. Evidence*, § 471.

To constitute an account stated there must be shown a mutual examination of the claims of each other by the parties, a like agreement between them as to the correctness of the respective claims, the ascertainment of the balance due, and a promise, express or implied, to pay. 1 C. J. 678; 1 Words & Phrases 93.

This balance must be a "book debt" as distinguished from a demand based upon a special contract or growing out of a tort. *Rosenbaum v. McEwen*, 24 Colo. App. 58, 131 Pac. 781; *Gunn v. Perseverance Min. & Mill. Co.* 23 Idaho, 418, 130 Pac. 459; *Ryan v. Rand*, 26 N. H. 12; *Bussey v. Gant*, 29 Tenn. 238.

The account, in order to constitute a contract, should appear to be something more than a mere memorandum. It should show clearly upon its face that it was intended to be a final settlement up to date. *Coffee v. Williams*, 103 Cal. 550, 37 Pac. 504.

Where oral negotiations are merged into writing, the rights of the parties must be determined by the written instrument. *Northwestern Fuel Co. v. Bruns*, 1 N. D. 137, 45 N. W. 699; *Gage v. Phillips*, 21 Nev. 150, 37 Am. St. Rep. 494, 26 Pac. 60.

An unwarranted restriction of the right of cross-examination is prejudicial error. The court here refused to allow defendant to cross-
35 N. D.—13.

examine Lemke with respect to the settlement and as to what was included therein. *State v. Hazlett*, 14 N. D. 490, 105 N. W. 617; *Hogen v. Klabo*, 13 N. D. 319, 100 N. W. 847, and cases cited; *Taggart v. Bosch*, 5 Cal. Unrep. 690, 48 Pac. 1092; 40 Cyc. 2480, and cases cited.

Such an account should show upon its face that it was intended to be a final statement up to date, and a promise to pay. *Coffee v. Williams*, supra; 1 Century Dig. 754, § 31; *Columbia River Packing Co. v. Tallant*, 133 Fed. 990; *Howell v. Johnson*, 38 Or. 571, 64 Pac. 659; *Peoria Grape Sugar Co. v. Turney*, 58 Ill. App. 563; *Davis v. Seattle Nat. Bank*, 19 Wash. 65, 52 Pac. 526.

The defendant had the right to show, if he could, the inherent improbability of his agreement to such an account. *Field v. Knapp*, 108 N. Y. 87, 14 N. E. 829; *Landis v. Watts*, 82 Neb. 359, 117 N. W. 705; *Baker v. Griffin*, 43 Misc. 1, 86 N. Y. Supp. 579; *E. W. McLellan Co. v. East San Mateo Land Co.* 166 Cal. 736, 137 Pac. 1145; *Campbell v. Blount*, 32 Misc. 756, 65 N. Y. Supp. 785; *Kaminsky v. Mendelson*, 25 Misc. 500, 54 N. Y. Supp. 1010; *Lawler v. Jennings*, 18 Utah, 35, 55 Pac. 60; *Christian v. Niagara F. Ins. Co.* 101 Ala. 634, 14 So. 374; *Bouslog v. Garrett*, 39 Ind. 338; *Binford v. Miner*, 101 Ind. 147; *Arnett v. Smith*, 11 N. D. 55, 88 N. W. 1037.

An application to amend a pleading is addressed to the discretion of the trial court. Such discretion is not an arbitrary one, but a legal one, and the court should be guided by the fixed principles of the law, and courts should allow amendments when in furtherance of justice. *Comp. Laws 1913*, § 7482.

Where the erroneous rulings of the court clearly contribute to the result, it is a mistrial. *Stringer v. Davis*, 30 Cal. 318; *People use of National Sewer-Pipe Co. v. Sharp*, 133 Mich. 378, 94 N. W. 1074; *Dunn v. Bozarth*, 59 Neb. 244, 80 N. W. 811; *Ford v. Liner*, 24 Tex. Civ. App. 353, 59 S. W. 943; *Hancock v. Board of Education*, 140 Cal. 554, 74 Pac. 44; *Martin v. Luger Furniture Co.* 8 N. D. 220, 77 N. W. 1005; *Finlayson v. Peterson*, 11 N. D. 45, 89 N. W. 855; *Kerr v. Grand Forks*, 15 N. D. 294, 107 N. W. 197; *Barker v. More Bros.* 18 N. D. 82, 118 N. W. 823.

Where letters or writings are erroneously allowed to be offered in evidence, the only way to correct the error is to withdraw them entirely from the case. *Merritt v. Meisenheimer*, 84 Wash. 174, 146 Pac. 370;

Lewis v. Utah Constr. Co. 10 Idaho, 214, 77 Pac. 336; *Hollenbeck v. Ristine*, 105 Iowa, 488, 67 Am. St. Rep. 306, 75 N. W. 355; *Kansas P. R. Co. v. Anderson*, 23 Kan. 44; *McMullin v. Reed*, 213 Pa. 338; 62 Atl. 924; *Crisp v. State Bank*, 32 N. D. 263, 155 N. W. 78.

Corroboration by any other credible evidence, positive or circumstantial, oral or documentary, is all the law requires. It is not necessary that a witness be corroborated by another witness. *F. Dohmen v. Niagara F. Ins. Co.* 96 Wis. 38, 71 N. W. 69; *Bratt v. Swift*, 99 Wis. 579, 75 N. W. 411; 1 *Blashfield*, Instructions to Juries, § 256.

The alleged "stated account" rests solely in parol and is not evidenced by any writing by which the defendant is legally bound. There was, however, an original written contract between the parties for the sale by Lemke to Thompson of real and personal property at a fixed price, to be paid in a specified manner. The plaintiff's theory of a "stated account" is adopted to vary or change the terms of this written contract. *Middleditch v. Ellis*, 2 Exch. 623, 17 L. J. Exch. N. S. 365; *Gilson v. Stewart*, 7 Watts, 100; *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99; *Thomasna v. Carpenter*, 175 Mich. 428, 45 L.R.A.(N.S.) 543, 141 N. W. 559, Ann. Cas. 1915A, 690; *Jasper Trust Co. v. Lamkin*, 162 Ala. 388, 24 L.R.A.(N.S.) 1237, 50 So. 337; *Valley Lumber Co. v. Smith*, 71 Wis. 308, 5 Am. St. Rep. 216, 37 N. W. 413; *Gutshall v. Cooper*, 37 Colo. 212, 6 L.R.A.(N.S.) 820, 86 Pac. 125; *Williams v. Williams*, 3 Ind. 222; *Kusterer Brewing Co. v. Friar*, 99 Mich. 190, 58 N. W. 52; *Fraley v. Bispham*, 10 Pa. 320, 51 Am. Dec. 486; *Gallinger v. Lake Shore Traffic Co.* 67 Wis. 529, 30 N. W. 790.

Flynn & Traynor, for respondent.

This court has held that it cannot dispose of the case on the merits without specifications of errors, and that, for the absence of same, the appeal may be dismissed. *Wilson v. Kryger*, 26 N. D. 77, 80, 51 L.R.A.(N.S.) 760, 143 N. W. 764; *Miller v. Thompson*, 31 N. D. 147, 153 N. W. 391; *Feil v. Northwest German Farmers Mut. Ins. Co.* 28 N. D. 355, 149 N. W. 358.

The appellant will not be permitted to urge, on appeal, a different theory from that upon which the entire cause proceeded in the lower court. *De Laney v. Western Stock Co.* 19 N. D. 630, 125 N. W. 499; *Casey v. First Nat. Bank*, 20 N. D. 211, 126 N. W. 1011; *Caledonia Gold Min. Co. v. Noonan*, 3 Dak. 189, 14 N. W. 426; *Noonan v. Cale-*

donia Gold Min. Co. 121 U. S. 393, 30 L. ed. 1061, 7 Sup. Ct. Rep. 911; State v. Leehman, 2 S. D. 171, 49 N. W. 3; Bailey v. Chicago, M. & St. P. R. Co. 3 S. D. 531, 19 L.R.A. 653, 54 N. W. 596; Tilton v. Flormann, 22 S. D. 324, 117 N. W. 377; First Nat. Bank v. Warner, 17 N. D. 76, 114 N. W. 1085, 17 Ann. Cas. 213; Kolka v. Jones, 6 N. D. 461, 66 Am. St. Rep. 615, 71 N. W. 558; St. Croix Lumber Co. v. Pennington, 2 Dak. 467, 11 N. W. 497; Mathews v. Silvander, 14 S. D. 505, 85 N. W. 998; Harrison v. State Bkg. & T. Co. 15 S. D. 304, 89 N. W. 477; Buchanan v. Minneapolis Threshing Mach. Co. 17 N. D. 343, 116 N. W. 335; Chilson v. Bank of Fairmount, 9 N. D. 96, 81 N. W. 33; Whiffen v. Hollister, 12 S. D. 68, 80 N. W. 156; Gaines v. White, 2 S. D. 410, 50 N. W. 901; Dowdle v. Cornue, 9 S. D. 126, 68 N. W. 194; F. Mayer Boot & Shoe Co. v. Ferguson, 19 N. D. 496, 126 N. W. 110; Loftus v. Agrant, 18 S. D. 55, 99 N. W. 90; 2 Cyc. 670 et seq.

Mistake or error in an "account stated" must be alleged and proved. Gutshall v. Cooper, 37 Colo. 212, 6 L.R.A.(N.S.) 820, 86 Pac. 125; Howell v. Johnson, 38 Or. 571, 64 Pac. 659.

An "account stated" may grow out of a transaction growing out of a written contract, and the account, when stated, need not be complete in itself. Krueger v. Dodge, 15 S. D. 159, 87 N. W. 965; Claire v. Claire, 10 Neb. 57, 4 N. W. 412; Hale v. Hale, 14 S. D. 644, 86 N. W. 650.

"While the doctrine as to 'account stated' may originally have had its origin in transactions between merchants, it has been quite generally extended to all cases where the relation of debtor and creditor exists." 1 C. J. 679, 682; Converse v. Scott, 137 Cal. 239, 70 Pac. 13; Watkins v. Ford, 69 Mich. 357, 37 N. W. 300; Swain v. Knapp, 34 Minn. 232, 25 N. W. 397; Krueger v. Dodge, 15 S. D. 159, 87 N. W. 965; Quinn v. White, 26 Nev. 42, 62 Pac. 995, 64 Pac. 819; Lay v. Emery, 8 N. D. 515, 79 N. W. 1053; Little v. Little, 2 N. D. 175, 49 N. W. 736; Montgomery v. Fritz, 7 N. D. 348, 75 N. W. 266; Wood v. Pehrsson, 21 N. D. 364, 130 N. W. 1010.

Goss, J. Action upon an account stated. The account originated with a sale in February, 1909, of merchandise, buildings, and lots to defendant for \$5,807.42, under a written contract.

The complaint states that in September, 1909, an account stated was agreed upon whereunder defendant was owing plaintiff \$826.84; that later offsets arose, and that a second and final account stated was entered into December 30, 1909, for \$758.34, the amount sued for with interest.

The answer pleads the original contract in full with many set-offs and payments made thereon, aggregating more than the contract price, and closes with a general denial of plaintiff's complaint.

Upon trial plaintiff made prima facie proof of alleged account stated, and defendant admitted that an adjustment of mutual accounts was had, and that he gave Lemke a statement in his own figures, as the amount due Lemke upon partial accounting. The statement is:

Principal	\$695.84
Interest	62.50

\$758.34

This is the amount sued for. Plaintiff testified that this balance included all mutual accounts and was in fact an account stated. Defendant, in his testimony, admits this constitutes a stated account upon all matters except one, an item of \$750 and interest, on one of the lot contracts, due from the seller to one Olsgaard, to take up which outstanding contract, defendant paid Olsgaard \$865 on May 18, 1910, and after the date of the account stated. Under the terms of the contract of sale this \$865 was the debt of Lemke, and not of Thompson, the seller having agreed to deliver title by warranty deeds to the lots so paid for in such amount by Thompson. The obligation of plaintiff to pay Olsgaard this amount for these lots stands admitted, as does the fact that defendant paid that amount to Olsgaard after the date of the account stated and for title and in performing Lemke's contract with Olsgaard.

The only dispute is that Lemke claims a deduction of \$750, for this item had been allowed Thompson in arriving at the account stated, leaving Thompson indebted to plaintiff for the amount of the account stated over and above the \$750 item. Defendant claims the contrary. He sets forth in his testimony his side of the controversy as follows: "Lemke came up there and it was in the month of December, 1909, and he said he was about to turn over all he had, turning over the balance that was still supposed to be standing against me, and there was

some stuff that was short, and he said, We will fix this all up now; and he says the boys are going to take this matter up with Olsgaard and pay it all up, and he said, You will get title to those lots. I told him of course I would have to have title to those lots, otherwise I wouldn't be owing them anything."

Q. Did he say that was all right when you said you would not be owing them anything, or what did he say about that?

A. Well he understood that, he said.

Q. Did he ask you to give him anything with reference to that balance there?

A. Well, he says, Put down on this slip about what you think there is balance on the account.

Q. Did he say anything to you what he wanted such a slip for?

A. Well, he wanted to show his brothers, he said, that there was still something coming there so that they would have some coming provided they paid the Olsgaard deal.

Q. And was it with that understanding and as a result of that talk that you placed these figures upon exhibit 2? (Statement of principal and interest.)

A. Yes.

Q. Was there anything else said there about the debt that he claimed you owed him at that time?

A. Nothing more than he said of course the boys was kicking about they didn't seem to get enough out of it, or something like that.

Q. And did he urge that to you as a further reason for obtaining from you this exhibit 2?

A. Yes.

Again he testifies: "Well, regarding that balance he says, of course you will be owing me this provided the boys pay for those Olsgaard lots."

Q. And were those Olsgaard lots part of the property that was included in this sale agreement, exhibit 1?

A. Yes.

Q. Did you afterwards obtain title to the Olsgaard lots?

A. Yes.

Q. In what manner did you get that title?

A. By paying Olsgaard \$865 by check, in May, 1910.

The check is in evidence and verifies the payment.

On cross-examination defendant was asked:

Q. I call your attention to exhibit 3 (a lengthy account plaintiff claims contains the detailed accounts of both parties and upon which the account stated was arrived at), to the statement therein, "purchase price of lots in Brocket assumed by Thompson, \$750,"—that refers to the Olsgaard lots does it not?

A. Why that was the figures of the lots,—of the purchase price, rather of the lots.

Q. So that in the figuring of that settlement the Olsgaard lots were figured as a credit to you of \$750?

A. No.

Q. You knew all the time that there was \$750 and interest against those lots did you not?

A. Yes.

It is then shown that the Olsgaard lots were inventoried among the goods sold with the business to defendant as "two lots on corner \$700," or in other words the lots were sold to defendant at that figure as a part of the consideration, with the sellers to perfect title to them.

Plaintiff's witness testifies that he compiled exhibit 3 from figures furnished by Thompson. That "Thompson got the figures and I put them down." This Thompson denies.

The sole issue of fact in the case was whether the account stated covered the consideration paid for these Olsgaard lots. Plaintiff says it did. Defendant says it did not, and that he, having subsequently paid it, is entitled to offset it against the account stated. That this was the issue of fact attempted to be presented to the jury is shown by the memorandum decision on denial of defendant's motion for a new trial. It reads: "Defendant claims that the amount claimed (in the account stated) would have been correct had it not been for the fact that the defendant afterwards was required to invest somewhat more than that amount in procuring title to some lots, which was the duty of Lemke to secure, and defendant insists that the amount claimed in the alleged account stated was to be due only in the event that the title

to these lots was procured for Thompson. The plaintiff and his witnesses claimed that in the alleged account stated the matter of these lots had been taken into consideration, and there was no contingency with reference to such account and the balance due. As evidence was permitted to go to the jury upon the question relative to the title of these lots and the procuring of this title, and *the instructions of the court covered that matter*, the jury necessarily determined that issue against the defendant, in effect finding by their verdict that there was no such contingency as claimed by Thompson. An exploration of the record together with the instructions to the jury I believe will confirm my opinion that this matter was fully and fairly submitted to the jury."

The learned trial court has thus defined the issue presented to the jury, and would be correct in its holding that the findings of the jury would be conclusive against defendant if said issue "was fully and fairly submitted to the jury," "and the instructions of the court covered that matter," quoting the opinion, but an exploration of the record discloses that by giving an instruction requested by plaintiff, the court wholly eliminated that issue of fact from the jury's consideration and in effect instructed the jury to find a verdict for plaintiff. Oral instructions were given, and the error is undoubtedly an oversight. After instructing fully upon the contentions of the plaintiff, the court said: "The defendant in his answer denies that he ever stated an account with Fred Lemke or anyone with reference to this matter as claimed by the plaintiff in this action, and you will remember what his claims are in relation to that as that appears in the evidence, being in brief that the items claimed by the plaintiff were right, provided the Lemke boys took care of the matter of the title and the payment for the title of certain lots and property over there in Bocket. . . . In this case the only question for you to decide is whether or not there was an account stated and agreed upon between the parties. *There was no proof of payment on the part of the defendants.* If you find that the parties did go over their differences and accounts and agreed upon the balance as claimed by the plaintiff, and that the defendant agreed that that balance was right, and either in expressed words or impliedly by actions agreed to pay that amount, then your verdict should be for the plaintiff in the full amount in this case. The testimony on the part of Lemke is to the effect that in the reckoning of the balance due on the account stated

Thompson was allowed credit for \$750 for the amount claimed by Thompson to get title to the Olsgaard lots. Even if the amount were not sufficient to fully cover that item and Thompson had to pay more later, makes no difference in this action, *if they settled their accounts between them and in settling the account between the parties they agreed upon this item of \$750.* Thompson has not in his answer claimed there was any mistake in arriving at the account stated, so he is bound by whatever agreement he made in the account stated, if an account stated was stated at all, as claimed by the plaintiff in this action." The foregoing immediately preceded the following given at plaintiff's request: "The testimony allowed in the evidence with reference to the payment of \$865 to Olsgaard by Thompson was allowed only for the purpose of throwing light into your minds as to whether or not the parties did in fact agree upon a balance due between them. *You must not consider this \$865 as a payment against the stated account, the \$758.34, if such balance were agreed upon, and you must not offset that \$865 against the balance of \$758.34, for if the balance was agreed upon between the parties as claimed by the plaintiff, the item covered by the \$865 for obtaining title to the Olsgaard lots is presumed to have been included in the amount before the balance was struck and agreed upon.*" This error was further emphasized by following it with, "So you see you don't have to deal in this case with payment at all. The plaintiff relied upon this account stated. If he has failed to show by a fair preponderance of the evidence that an account was stated between these parties as claimed, then he fails in this lawsuit, and your verdict must be for the defendant. On the other hand, if you find, as a matter of fact, that an account was stated between these parties and agreed upon as claimed by the plaintiff, then you would have nothing to do with the question of payment because that is not in this case. I admitted that matter of payment simply as matter of corroboration or to throw light upon the claim of the defendant as to what he claims was the agreement between them at the time."

The real issue of fact was not whether there was an account stated. It was admitted that one was stated. There was no controversy over that question. But the single issue of fact was as to whether the lot consideration was included in it. If it was, plaintiff should have recovered. If not, the verdict should have been for defendant. There was no pre-

sumption under the proof that the account as stated covered the Olsgaard transaction. The court instructed that "the items covered by the \$865 for obtaining title to the Olsgaard lots is presumed to have been included in the account before the balance was struck and agreed upon." This was error. There was no such presumption. If there was an issue of fact on that question it remained such, and for the jury. Neither was it necessary for the court to confuse the issue by instructing on payment. If it could have instructed as it did, it could have directed a verdict for plaintiff. To have done so would have been error, as there was a controversy upon whether the Olsgaard lot consideration was included within the mutual agreement of accounts.

If defendant is correct on facts, he had the right to assert such claim as a defense inasmuch as he made the payment for the lots after the account stated had been agreed upon. And this could be shown under general denial, inasmuch as the plaintiff claims the amount is owing because of the account stated. The defendant denies that he owes thereon, and has as a defense plead the original contract, including the obligation of the seller to convey to Thompson by warranty deeds the lots held under contract with Olsgaard, and that on May 18, 1910, the defendant had to pay Olsgaard \$865 for title. While this is not specifically stated as a defense, it can be shown under a general denial, *Anderson Mercantile Co. v. Anderson*, 22 N. D. 441, 134 N. W. 36, and the case was tried and submitted upon that theory as shown by the record, the memorandum decision of the court, and instructions. There is some question raised as to whether an account stated must cover all transactions whatsoever. "Parties holding mutual and open claims against each other may agree as to some of such items, leaving other items for future adjustment, and an action upon an account stated may be maintained for the balance arrived at from the items considered. But in such action the party against whom the balance is claimed may offset against it any balance which he claims from the items not included in the settlement." 1 R. C. L. 220, citing *Ingle v. Angell*, 111 Minn. 63, 126 N. W. 400, 137 Am. St. Rep. 533, 20 Ann. Cas. 623, and note. See also notes to 23 L.R.A.(N.S.) 787, and 24 L.R.A.(N.S.) 1237, and *Tuggle v. Minor*, 76 Cal. 96, 18 Pac. 131, and *Jasper Trust Co. v. Lamkin*, 136 Am. St. Rep. 33 and extensive note. (162 Ala. 388, 24 L.R.A.(N.S.) 1237, 50 So. 337.)

The California case states the rule to be "when all the items of the account are admitted to be correct except certain ones which are left by the parties for future adjustment, the account becomes stated as to those items which are admitted to be correct."

Defendant had a right under a denial of the account stated alleged in the complaint to show an account stated as to a portion of the items only and that the account as stated did not include an offset owing in reduction of or in extinction of the amount due plaintiff under the account stated upon the items of account thereby settled and adjusted.

From rulings and remarks of the trial court made during the trial, it is apparent that it held too narrow a view of defendant's rights under the issue presented by the general denial. Errors in the instructions necessitate reversal of the judgment and the granting of a new trial. It is so ordered.

STATE OF NORTH DAKOTA EX REL. D. H. McARTHUR v.
FRED McLEAN, Joseph M. Kelly, and the State Central Committee of the Democratic Party in the State of North Dakota.

(159 N. W. 847.)

Original and prerogative writ — supreme court — issuance of — public concern — ground for — attorney general — proceedings — refusal to bring — mere acquiescence in.

1. Where the issuance of an original and prerogative writ is asked of the supreme court on the ground that the matter is of public concern, and the attorney general refuses to bring the proceedings, but expresses a willingness that they shall be brought, the case will be considered in the same light as if there had been merely a refusal on the part of the attorney general.

Original writ — supreme court — public importance — matters of — involved — will issue — attorney general — refusal to act — or sanction.

2. The supreme court will not refuse to issue its original writs where matters of public importance are concerned, merely because the attorney general refuses to himself bring or sanction the action.

Supreme court — jurisdiction — question — test of — individual relator — necessary party — public injury — sought to be remedied — franchises — prerogatives of state.

3. The test of the jurisdiction of the supreme court where the issuance of

an original writ is prayed for but the attorney general refuses to bring the proceedings is whether the individual relator is in fact a necessary party or a mere incident, and whether after all it is a public injury which is sought to be remedied or prevented, and involves the franchises and prerogatives of the state.

Elective franchise — unhindered right to exercise — individual — collective sovereign state — publici juris — prerogatives of sovereign state — supreme court — discretion.

4. The right to the untrammelled exercise according to law of the elective franchise, even though it is, strictly, speaking, a right or franchise of the individual citizen rather than of the collective and sovereign state, and even though, in a limited area, is a matter not only *publici juris*, but one which ultimately affects the self-governing franchises and prerogatives of the sovereign state itself, and can in the discretion of the supreme court, and in exceptional cases, be safeguarded by the issuance of its prerogative writs.

Public office — public position — sovereignty of state — subdivisions — attaches — whole public — benefit of — political party — state central committee — chairman of — not a public officer.

5. A public office is a public position to which a portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public. The chairman of a state central committee possesses no such authority, and is therefore not a public officer.

Injunction — constitution — writ of mandamus — correlative — civil or property rights — not limited to — sovereignty of state — franchises — prerogatives — liberties of the people — political and civil rights — attorney general — opposition to — may issue.

6. The writ of injunction contemplated by § 87 of the Constitution of North Dakota is correlative with the writ of mandamus, the former issuing to restrain and the latter to compel action, and is not limited to cases involving civil or property rights, but may be resorted to in all cases affecting the sovereignty of the state, its franchises, or prerogatives, or the liberties of the people. It includes within its scope and protection political as well as civil or property rights, and may be issued under a proper showing and in the discretion of the court even at the suit of a private individual and against the opposition of the attorney general himself.

Political matters — state central committee — courts — control — statutes — constitution.

7. The courts will not assume a greater control of or supervision over purely political matters than can clearly be deemed to have been conceded to them by the express provisions of the statutes and of the Constitution.

Political party — central committee — members thereof — chairman — supreme court — prerogative writ — political act — subject to political remedy — writ will not issue.

8. The majority of the members of a political state central committee has the inherent power to depose or elect a chairman at any time, and the supreme court will not issue its high prerogative writs in order to bring about that which voluntary political action can perform.

State central committee — membership of — chairman — laws — prerequisites to chairmanship.

9. Section 890 of the Compiled Laws of 1913 examined and *held* not to make membership in the state central committee prerequisite to its chairmanship.

Opinion filed October 12, 1916.

Original application to the Supreme Court for the issuance of its prerogative writs in order to oust one Fred McLean from the position of chairman of the Democratic State Central Committee.

Application denied.

Statement of facts by BRUCE, J.

This is an application for the exercise of jurisdiction of this court, and is brought to test the right of Fred McLean to the office of chairman of the Democratic state central committee.

The amended petition is as follows:

Comes now D. H. McArthur, and for amended petition respectfully represents unto your Honors and alleges:

That he is a citizen, resident, and legal voter of the state of North Dakota, affiliating with and is a member of the Democratic party, and at the recent primary election in this state your petitioner was nominated as the candidate of the Democratic party for the office of governor of the state of North Dakota, and is now such candidate.

That since said primary election the members of the state central committee of the Democratic party were duly selected and named in the manner prescribed by law, there being forty-nine members so selected as state central committeemen. A list of said members appears attached to the original petition herein and is hereby referred to and made part hereof.

That on the 6th day of September, 1916, twenty-one members of

said state central committeemen so selected met at Bismarck as required by law, and there met together with them at the same time and place twelve other persons, each of whom held a proxy given to him by a duly elected committeeman purporting to authorize the holder of such proxy to attend such meeting of the state central committee, and act and vote for and represent the elected committeeman in the latter's absence.

That at said meeting the twelve persons so holding proxies were permitted to act and exercise the powers of regularly elected committeemen, and such holders of such proxies were counted in order to constitute a majority of said committee, although, as before stated, there were only twenty-one elected committeemen present at said meeting.

That at said meeting, composed as aforesaid of said twenty-one committeemen and the twelve persons holding proxies of absent committeemen, the majority of the persons so present at said meeting and pretending to constitute a majority of the state central committee selected and named one Fred McLean to be chairman of said state central committee and one Joseph Kelly to be treasurer thereof, and one W. E. Beyerly to be temporary secretary, and said Fred McLean and said Joseph Kelly accepted said respective offices and are now holding and exercising the same.

That neither said Fred McLean nor said Joseph Kelly were or ever had been selected or named as members of said state central committee, and, therefore, as your petitioner is advised and verily believes, they, the said Fred McLean and Joseph Kelly, were not eligible to said offices to which they were so named, and said meeting not being a majority of the members of said state central committee, a quorum of said committee was not present participating in said meeting, and hence all the acts of said meeting were and are null and void; and for the reasons aforesaid your petitioner is advised and verily believes that said Fred McLean and Joseph Kelly are unlawfully holding and usurping said respective offices.

That at said meeting so held as aforesaid the persons there present, pretending to be a majority of said committee, ordered and appointed an executive committee consisting of E. H. Stenwick, H. Nelson Kelly, H. D. Allert, John Sprafka, A. J. Schorer, Kenneth Ferguson, and Joseph Mann.

That your petitioner is advised and believes that there is no adequate remedy for the unlawful usurpation of said offices by the said Fred McLean and Joseph Kelly except by the exercise of the original jurisdiction of this Honorable Court, and, therefore, your petitioner presents this petition in his own behalf and in behalf of all other citizens and electors of the state of North Dakota, and prays that this court issue its process to said Fred McLean and Joseph Kelly, and to the members of said Democratic State Central Committee, requiring them to be and appear before this court and answer this petition, and that this court thereupon adjudge that said Fred McLean and Joseph Kelly are unlawfully usurping said respective offices now so held and claimed by them, and that they, and each of them, be ousted therefrom, and be forever enjoined and forbidden to intrude into or exercise the functions of said offices, and that said State Central Committee be ordered and required to forthwith meet and properly organize in accordance with the law, adopt rules and regulations, and publish and promulgate a platform of principles for the candidates of said Democratic party at the coming election.

To this petition the defendants first filed a motion to dismiss the proceedings, which was as follows:

Come now the defendants in the above-entitled action, and respectfully show to the court

1.

They each separately and all jointly object to the jurisdiction of the court and to the consideration by the court of the petition and amended petition served and filed in the above-entitled matter, for the reason that it appears upon the face of said petition and amended petition that the said defendants F. W. McLean and Joseph M. Kelly are not usurping or attempting to usurp, intrude into, or unlawfully hold or exercise, any public office or franchise within this state, or are doing or attempting to do any act, or hold or exercise the authority of any public office, within the state of North Dakota, and that the court has no jurisdiction of the subject of the action.

2.

That each separately and all jointly object to the consideration of the petition or amended petition in the above-entitled action, and move to dismiss the same for the reason that it appears upon the face thereof that the subject of the proceedings does not involve any public function, neither does it involve any matter in which the public is concerned. That it involves a mere private desire without a showing of perceivable benefit to the relator or any other person.

3.

They each separately and all jointly object to the consideration by the court of the petition and amended petition herein, for the reason that it appears upon the face of said petition and amended petition that the said defendants Fred McLean and Joseph M. Kelly were elected to offices or positions upon a political committee, which offices or positions are in no sense public offices, either civil or military, under the laws of the state of North Dakota.

That neither the state in its sovereign capacity, nor the public as a public, is concerned in the subject-matter involved and set forth in said pleadings.

That the relator is a private person, having no interest in the subject-matter other than a purely personal and private one, and that no benefit or result to either the public or to any person is disclosed by the pleadings.

That conceding all of the facts set forth in said petition and amended petition, there is not set forth such facts or such subject for consideration as calls for the issuance of an original writ by this court, or entitles the relator to the relief prayed for.

Wherefore, defendants pray this Honorable Court for an order dismissing said above-entitled proceedings.

They then filed the following demurrer:

Now come the above-named defendants and reserving to themselves separately and jointly all manner of advantage to which they or either of them is entitled by reason of answer or motion to dismiss, and without waiving any rights by reason of written motion to dismiss said

above proceedings, and for the purpose of demurring to the pleadings and all of the pleadings on behalf of the relator and to the cause of action therein set forth, respectfully shows to the court.

1.

They each separately and all jointly demur to the petition and amended petition of the relator above named and to the cause of action therein set forth, that the court has no jurisdiction of the subject of the action therein set forth, on the ground and for the reason that the said office of chairman of the State Central Committee of the Democratic Party in the State of North Dakota, and that the office of treasurer of said state central committee, is not a public office either civil or military or any franchise within this state, neither does said office or either of them come within the provisions of any law of the state of North Dakota conferring upon this court jurisdiction to hear and determine the right thereto in these proceedings.

2.

They each separately and all jointly demur to the petition and amended petition of the relator above named, and to the cause of action therein set forth, for the reason that the plaintiff or relator in said proceedings has no legal capacity or right to institute and prosecute such proceedings, it appearing from said pleadings that the interest of the relator is a purely personal and private interest, and does not involve any governmental function or public concern.

3.

They each separately and all jointly demur to the petition and amended petition of the relator above named, and to the cause of action therein set forth, on the ground and for the reason that neither said petition nor amended petition state facts sufficient to constitute a cause of action or entitle the relator to the relief prayed for or to any relief.

4.

That each separately and all jointly demur to the petition and

amended petition of the relator above named, and to the cause of action therein set forth, on the ground and for the reason that there is a defect of parties plaintiff in that said proceedings, if maintainable at all, should be maintainable only at the instance of the attorney general.

Wherefore, defendants pray judgment that said action be dismissed with costs.

An order to show cause was granted on the petition, the court by this means reserving to itself an opportunity to consider the question of its jurisdiction in the premises; on the hearing, however, both the question of jurisdiction and the points raised by the demurrer were argued.

Engerud, Holt, & Frame, for petitioner.

Bangs, Hamilton, & Bangs, and *Halvor L. Halvorson*, for defendants.

BRUCE, J. (after stating the facts as above). The first question to be determined is whether the supreme court can, in the exercise of its original jurisdiction, interfere with or supervise the conduct of the members of the state central committee of the respective parties of this state, and insist that such committee shall conform to the provisions of the statute and of the Constitution in relation to the selection of their officers.

The second is whether, if the court has this power, it should exercise it, the rule seeming to be that its discretion is at any rate involved in all such matters.

Section 86 of the Constitution of North Dakota provides: "The supreme court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the state, and shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law."

Section 87 of the Constitution of North Dakota provides that the supreme court "shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction and such other original

and remedial writs as may be necessary to the proper exercise of its jurisdiction, and shall have authority to hear and determine the same; provided, however, that no jury trial shall be allowed in said supreme court, but in proper cases questions of fact may be sent by said court to a district court for trial."

Section 7339 of the Compiled Laws of 1913 provides: "The supreme court shall have and exercise appellate jurisdiction only, except when otherwise specially provided by law or the Constitution. The supreme court has power in the exercise of its original jurisdiction to issue writs of habeas corpus, mandamus, quo warranto, certiorari and injunction; and in the exercise of its appellate jurisdiction and in its superintending control over inferior courts it may issue such original and remedial writs as are necessary to the proper exercise of such jurisdiction; provided, that said court shall exercise the said original jurisdiction only in habeas corpus cases and in such cases of strictly public concern as involve questions affecting the sovereign rights of the state or its franchises or privilege."

The statute now under consideration provides:

"§ 890. The county committee of each party shall be composed of all the precinct committeemen of each party in addition to committeemen chosen at large by the following named county nominees of each party, selected in the following manner, to wit: The nominees for the following county offices; namely: clerk of court, county treasurer, county auditor, register of deeds, sheriff, state's attorney, superintendent of schools and county judge, and the legislative nominees residing in such county shall each be entitled to select and appoint in writing one committeeman at large, which appointment shall be immediately filed with the county auditor. The committeeman thus appointed, together with the precinct committeemen elected as prescribed in § 889, shall constitute the county committee of each county, and they shall meet in the courthouse at the county seat of each county at 2 o'clock P. M. on the third Wednesday after each primary election and organize by selecting a chairman, a secretary and a treasurer, by adopting rules and modes of procedure, and by selecting an executive committee consisting of from five to nine persons chosen from the county committee, of which executive committee the chairman and secretary shall be members. Such county committee shall at the same time select one

person who shall be a legal voter to act upon and be a member of the state central committee of such party in all counties consisting of one legislative district, and in counties having more than one legislative district the precinct committeeman from each legislative district shall select one person from their respective legislative district; and when two or more counties are embraced in one legislative district the county committee of each county shall meet at the courthouse of the county seat of the senior county of such district at 2 o'clock P. M. on the fourth Wednesday after each primary election and select one person, who shall be a legal voter, to act upon and be a member of the state central committee of such party. The members so selected as state central committeemen shall meet at the state capitol on the first Wednesday of September and organize by selecting a chairman, a secretary and treasurer, and shall adopt rules and modes of procedure and promulgate and publish a platform or principle upon which its candidates shall stand. Each member of any committee shall retain such position until his successor is chosen. Every member so selected shall be a legal voter. Vacancies shall be filled by a majority of the committee by appointment from the district in which such vacancy exists."

In the case at bar the attorney general of the state has expressed his willingness that the proceedings shall be brought, but has refused to bring them himself, as he considers that it is not a case in which his office should be concerned.

The case, therefore, is similar to one in which an application has been made to the attorney general to institute the proceedings, but he has refused to do so, and where an application is made to this court by a private citizen to bring them. It is not, therefore, a case in which the state as a state is seeking to exercise its sovereign power and to assert its prerogative, but a case in which a private citizen and voter and a candidate for public office, who is more or less affected by the matter, seeks the protection of this court on the ground that the sovereign rights of the state or its franchises are after all the sovereign rights and franchises of all its citizens, and that all of its citizens are interested in having the political and elective machinery of the state properly administered.

If these public interests are, in fact, involved, this court will and should assume jurisdiction in the matter, for, as was well stated by

the supreme court of Wisconsin, "this court cannot play fast and loose with the subject of jurisdiction. It either has it absolutely whenever a proper cause is presented, or else it has not got it at all. If it has jurisdiction in such a cause, it is because it has been conferred on the court by the people in their sovereign capacity, in the clause of the original law quoted. If such jurisdiction is thereby vested in the court,—as must be conceded by all,—then it would seem to be idle to deny the jurisdiction in such action merely because the attorney general has refused to co-operate or consent." *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 17 L.R.A. 145, 35 Am. St. Rep. 27, 53 N. W. 35.

In the case of *State ex rel. Moore v. Archibald*, 5 N. D. 359, 66 N. W. 234, this court held that the constitutional provisions similar to our own could not be construed as conferring upon the supreme court appellate jurisdiction merely, and the power to issue writs in furtherance of that appellate jurisdiction merely, as two of them, namely, injunction and quo warranto, were writs which could neither be employed in aid of the appellate jurisdiction nor of the superintending control conferred upon the court. It, therefore, held that all of the writs mentioned could be used in all cases as well in furtherance of jurisdiction as to initiate it, in aid of superintending control and of appellate jurisdiction, as well as in the exercise of original jurisdiction. It, however, held that it could not have been the intention to confer upon the supreme court concurrent jurisdiction with the district courts in all cases, but only in instances where what might be called prerogative writs could formerly have been issued by the English Court of King's Bench. In speaking of these writs it classed the writ of injunction as a quasi prerogative writ. It held that, in the case of those writs which are put to both private and public uses, the grant of power to the supreme court is limited to those cases in which, though the interests of private suitors may more or less be involved, the prerogatives of the sovereign power are also involved in some public and important respect, or the liberty of its citizens is at stake.

In defining the boundaries of this original jurisdiction, this court said that it was not enough that the question should be *publici juris*, but it should be one affecting the sovereignty of the state, its fran-

chises or prerogatives, or the liberties of its people, and that it should involve in some way the general interests of the state at large.

To warrant the assumption of original jurisdiction, this court said: "The interest of the state should be primary and proximate, not indirect or remote; peculiar perhaps to some subdivision of the state, but affecting the state at large in some of its prerogatives; raising a contingency requiring the interposition of this court to preserve the prerogatives and franchises of the state in its sovereign character, this court judging of the contingency in each case for itself. For all else, though raising questions *publici juris*, ordinary remedies and ordinary jurisdictions are inadequate, and only when for some peculiar cause these are inadequate, will the original jurisdiction of this court be exercised for protection of merely private or merely local rights."

See also *State ex rel. Steel v. Fabrick*, 17 N. D. 532, 536, 117 N. W. 861; *State ex rel. Linde v. Taylor*, 33 N. D. 76, L.R.A.—, —, 156 N. W. 561.

Again, in the recent case of *State ex rel. Linde v. Taylor*, *supra*, and in the case of *State ex rel. Bolens v. Frear*, 148 Wis. 456, 500, L.R.A.1915B, 569, 606, 134 N. W. 686, 135 N. W. 164, Ann. Cas. 1913A, 1162, one of the tests of jurisdiction was stated to be, "whether the private relator was in fact a necessary party at all or a mere incident, and whether it was after all a public injury which was sought to be remedied or prevented."

If we apply these tests to the case at bar we cannot help but hold that the sovereignty of the state is in no way affected, and that it was this question of sovereignty which alone was relied upon by this court in many of the cases where jurisdiction has been assumed.

In the cases of *State ex rel. Moore v. Archibald*, *supra*, this court expressly states that while the contest was nominally between two individuals claiming the office of the superintendent of the state insane asylum, the real question involved was whether a state administrative board should be allowed to exercise that portion of the sovereignty of the state vested in it by the statute giving the board the general management and control of a state institution, and the power to remove at any time the superintendent and appoint a new one in his place. "This institution," it said, "receives a large appropriation of state funds, and is placed by the legislature under the control of a board

of trustees. It certainly concerns the sovereignty of the state, not remotely and in a trifling particular, but directly and in a very important sense, whether one citizen shall defy the sovereignty of the people, and, by retaining his office of superintendent after removal, usurp to that extent the control of a great and expensive state institution. This court does not give relief in this case out of any consideration for the private rights of the relator, but solely to uphold the sovereignty of the state against a direct attack upon it in a matter of great public importance."

The same considerations applied in the case of *State ex rel. Erickson v. Burr*, 16 N. D. 581, 113 N. W. 705, and where the right of a district judge to administer the important and sovereign duties of his office was concerned.

They also applied in the case of *State ex rel. Baker v. Hanna*, 31 N. D. 570, 154 N. W. 704, where the State Board of Immigration was required to organize and assume its ministerial functions.

Nor can it be strictly said that any franchise of the sovereign state is concerned, that is to say, the exercise of any right granted to it or reserved to it by the Constitutions, state and national, in its governing and property-holding capacity.

This court, however, in many recent cases has expanded the rule as apparently first laid down in the case of *State ex rel. Moore v. Archibald*, *supra*, and has held that the right to the untrammelled exercise according to law of the elective franchise, even though, strictly speaking, a right of franchise of the individual citizen rather than of the collective and sovereign state, and even though it, is in a limited area as in a county, is a matter not only *publici juris*, but one which ultimately affects the self-governing franchises and prerogatives of the sovereign state itself, and can, in the discretion of the court, and in exceptional cases, be safeguarded by the issuance of its prerogative writs. See *State ex rel. Steel v. Fabrick*, 17 N. D. 532, 117 N. W. 860; *State ex rel. Buttz v. Lindahl*, 11 N. D. 520, 91 N. W. 950; *State ex rel. Fosser v. Lavik*, 9 N. D. 461, 83 N. W. 914.

The situation then is this. The writ of *quo warranto* when used as a high prerogative writ was at first only used to test the right to some public office, and even then could only issue at the instance of a proper official representative of the government. *State ex rel.*

Butler v. Callahan, 4 N. D. 481, 61 N. W. 1025; High, Extr. Leg. Rem. § 45, note 6.

In the case at bar the office involved is not a public office, as the occupant performs no governmental functions. A public office is "a public position to which a portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public." It implies an authority to exercise some portion of the sovereign power of the state either in making, administering, or executing the laws. See notes to 30 Am. Dec. 44, and 63 Am. St. Rep. 181.

The chairman of a state central committee possesses no such authority, and he is therefore not a public officer.

The courts, too, and under constitutional provisions similar to our own, at first doubted whether the equitable writ of injunction would and should issue except where property rights were directly involved. See note to 3 L.R.A. (N.S.) 382.

Later, however, though hesitatingly, they repudiated this idea, and came to hold that the writ of injunction contemplated by the constitutional provisions referred to was correlative with the writ of mandamus, the former issuing to restrain while the latter compels action, and that the prerogative writ of injunction of which the supreme courts of Wisconsin and North Dakota, and no doubt many other states, are given original jurisdiction, by their various constitutional provisions, is a writ of a different nature and having a different scope and purpose from an ordinary injunction in equity, and is not limited to cases involving civil or property rights, but may be resorted to in all cases "affecting the sovereignty of the state, its franchises or prerogatives, or the liberty of the people," and thus includes within its scope and protection political as well as civil or property rights, and may be issued under a proper showing and in the discretion of the court, even at the suit of a private individual and against the opposition of the attorney general himself. Note to 3 L.R.A. (N.S.) 382. See *State ex rel. Atty. Gen. v. Cunningham*, 81 Wis. 440, 15 L.R.A. 561, 51 N. W. 724; *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 17 L.R.A. 145, 35 Am. St. Rep. 27, 53 N. W. 35; *State ex rel. Moore v. Archibald*, 5 N. D. 359, 66 N. W. 234; *State ex rel. Erickson v. Burr*, 16 N. D. 581, 113 N. W. 705.

They held, and the North Dakota court held, in such cases, however, that is to say where the sovereignty of the state was not directly affected, where no public office was involved or the franchises and prerogatives of the state as a whole concerned, and where all that could be said was that the matter was *publici juris* and indirectly affected the public as a whole, by involving* the local franchise of the citizen or his political rights, that the high prerogative writs of the supreme court should and could only issue in extreme and exceptional cases and where there was an imperative demand for the same.

But here there is no such demand. The meeting was duly called and at the time prescribed by statute. We must presume that those members who desired to be present were present there. We have no protest from any of the members of the central committee, but merely from an outsider, who, though he is deeply concerned in the matter, had no voice or vote. A majority was certainly represented if the proxies are to be counted. If the result of the meeting was not satisfactory to the majority another meeting could have been called and may still be called, and any mistake made could and can still be corrected. There is nothing said in the statute as to the term of office of the chairman, and we see nothing to prevent the majority from reconsidering the action taken and choosing whom they will. Why should this court be called upon to do that which the majority of the committee have still the power to do? We are asked to oust the present chairman. Why cannot the committee do that themselves? If the platform as promulgated is not satisfactory, the remedy is still in the hands of the committee. There is really nothing for us to do; the matter is purely a political one.

Formerly the courts would not have concerned themselves with these matters at all, but would have left them entirely for the political tribunals to determine. Though our recent statutes have made material innovations in our election laws, and, in many respects, have put many matters which were purely political, and which concerned the members of the respective parties merely, both under legislative control and the authority of the courts, we have no right to assume that it was the legislative intention that these purely political matters should be interfered with to any greater extent than was clearly expressed by the statutes, or that it was the intention that the courts should have

any greater powers in the matter than might be clearly implied from the language of the acts themselves. The authority of the courts even now can be no greater or more comprehensive than is necessary to carry out the clearly expressed legislative will and intention, and in order that they may be increased, or be assumed to have been increased, there must be a clear indication of that will and of that intention.

As we view the case, no exercise of its jurisdiction is required of this court. For the future guidance of the parties, however, and in order that a legislative change may be made in the statute if such change is desired as well as to make clearer what we have already said, we will express our opinion as to the main points of the controversy.

We are satisfied that membership in the central committee is not necessary to its chairmanship, and this for the simple reason that the act of the legislature does not make it necessary, and we have no right to interpolate anything into the statute. In order to hold that the chairman of the State Central Committee must be a duly elected member of that body we must interpolate.

There is an express provision that the executive committees of the counties shall be members of the county committees and that the chairman and secretaries of the county executive committees shall be chosen from the membership of such county committees, but when the *same section* of the statute later deals with the state central committee no such provision is to be found. All it says is that "the members so selected as state central committeemen shall meet at the state capitol on the first Wednesday of September and *organize by selecting* a chairman, a secretary and treasurer, and shall adopt rules and modes of procedure, and promulgate a platform or principles upon which its candidates shall stand."

We must assume that the legislature, in omitting this requirement as to membership in the committee in this subsequent clause, and when it was dealing with the state central committee, did so advisedly, and we have no right to interpolate words or provisions which they must be presumed to have purposely omitted.

It has been the almost uniform ruling of the courts in the case of private corporations that the president, secretary, treasurer, and even the directors, may be chosen from persons who are not even stock-

holders, unless there is some positive provision in the statute, the charter, or the by-laws prohibiting such a practice, and certainly the same construction of the statutes should be applied in the case of political committees as in passing on the acts which create and define the powers and duties of these corporations. See *Cook, Corp.* 6th ed. §§ 11 and 623; 1 *Michie, Bkg.* 257; *Thomp. Corp.* 2d ed. §§ 916, 917; *Hume v. Commercial Bank*, 9 *Leo*, 728; *Bristol Bank & T. Co. v. Jonesboro Bkg. & T. Co.* 101 *Tenn.* 545, 48 *S. W.* 228; *Camden Safe Deposit & T. Co. v. Burlington Carpet Co.* — *N. J. Eq.* —, 33 *Atl.* 479; *Re St. Lawrence S. B. Co.* 44 *N. J. L.* 529; *Hoyt v. Bridgewater Copper Min. Co.* 6 *N. J. Eq.* 253, 275; *State ex rel. Atty. Gen. v. McDaniel*, 22 *Ohio St.* 354, 367; *Wight v. Springfield & N. L. R. Co.* 117 *Mass.* 226, 19 *Am. Rep.* 412; *Wright v. Floyd*, 43 *Ind. App.* 546, 86 *N. E.* 971; *Fey v. Peoria Watch Co.* 32 *Ill. App.* 618; *Buffalo Electro-Plating Co. v. Day*, 151 *App. Div.* 237, 135 *N. Y. Supp.* 1054; *Horbach v. Tyrrell*, 48 *Neb.* 514, 37 *L.R.A.* 437, 67 *N. W.* 485; *People v. Northern R. Co.* 42 *N. Y.* 217.

The courts indeed have held uniformly that a director of a corporation is merely an *agent*, and, being such, in the absence of an express statutory or charter requirement, need not be a stockholder. Surely the same reasoning applies to the chairman, secretary, and treasurer of political committees, and where such officers are, as we all know, merely campaign managers. *Thomp. Corp.* 2d ed. §§ 916, 917; *Cook, Corp.* 6th ed. §§ 11 and 623; 1 *Michie, Bkg.* § 257.

The reason for the holdings of the courts in these matters is quite apparent. In the first case it is the province of the courts to construe and to enforce the commands of the legislature, and not to themselves legislate. In the second there are many good reasons for the legislative policy referred to. The officers of a corporation, in order to properly serve its interests, must have technical and business experience, while all that is necessary to the stockholders is that they shall have the money with which to pay for their stock. Often, therefore, there are among the stockholders, none who possess this business and technical experience, and it is but reasonable that others should be permitted to be employed.

The same thing is true of political state central committees. The chairman is a campaign manager rather than a presiding officer, and

the duties of the secretary and treasurer are merely ministerial. It often happens that there is none among the members of these committees who has the time, ability, or inclination for this campaign and routine work. If, as is stated by the writers, the directors of a corporation may be considered in the light of agents merely, and as such, and in the absence of a statutory or charter provision, are required only to possess the usual qualifications of agents, much more must this be true of these political agents.

If, too, the construction which is contended for by the petitioner applies, not only must the chairman be a member of the committee, but the secretary and treasurer also, for the offices are all treated together in the same connection and in the same sentence. The committee is instructed to select not a chairman merely, but "a chairman, secretary, and treasurer." When, however, we come to examine the records of the past, we find that the secretary of the Republican State Central Committee was not such a member in 1898, 1900, 1902, 1904, 1906, 1910, and 1912, nor was the secretary of the Democratic State Central Committee in 1896, 1898, 1902, 1904, 1906, 1908, 1910. We also find that in 1896, 1898, 1908, 1910, and 1912 and 1916 the chairman of the Republican State Central Committee was not such a member, nor was the chairman of the Democratic State Central Committee such a member in the years 1906 and 1910, nor was the treasurer of the Democratic committee a member in the years of 1906, 1908, and 1910.

The act which we are called upon to construe became a law in 1907. We must assume that at the time of its passage the members of the legislature were cognizant of the political history and practices of the past, and that, when they omitted the requirement of membership which they had expressly provided in the same section of the statute in the case of county and district committees, they did this advisedly. The practice also which has since been followed in the matter, and in both of the political parties mentioned, surely furnishes some proof of a contemporaneous construction. We, too, must remember that the legislature contained representatives of and was legislating for both of the principal political parties of the state, and must therefore have considered the practices which prevailed in each.

It is also urged that a majority of the members of the state central

committee was not present at the election or selection in question, and that the proxies of absent members were used. The use of proxies, however, in political bodies has throughout the history of the state almost universally prevailed and been conceded, and was recognized by the legislatures of 1890 and 1895 by regulating, but not prohibiting the same. (See Comp. Laws 1913, § 9294; Rev. Codes 1895, § 6899; Laws 1890, § 1, chap. 112). We must assume, therefore, that the right still prevails. It is also to be noticed that the statute in controversy expressly gives to the state central committee the power to adopt its "own rules and modes of procedure," and this power in the light of the practice of the past would seemingly include that of recognizing proxies. There, too, is no showing that the petitioner was not elected or selected by a majority of the elected members of the committee who were present, and that the use of the proxies was in anyway necessary to the choice. There is nothing in the statute which requires that a majority of the elected committeemen shall be present at such a meeting, and as the meeting was a regular meeting where date and place was fixed by the statute, and as no majority vote of the elected members was expressly required, we are at liberty to assume that it was the intention of the legislature that a majority vote of those present should be all that was necessary, as is the case in elections generally. But be this as it may (and we are free to admit that we entertain much doubt upon this question), the matter is purely a political one. We have not here the case of two rivals contesting for the same office and each claiming to have been properly elected, but a questioned authority merely with no rival applicant. We have not indeed the elements of a judicial controversy, and surely this court cannot compel the absent members to be present any more than it can compel the voters to go to the polls or the members of the legislature to travel to Bismarck and to perform their duties. When the supreme court of Wisconsin declared two successive gerrymanders of the state unconstitutional, it stopped at that, and did not attempt to summon the legislature to meet again, though such action on the part of the legislature was absolutely necessary. (See *State ex rel. Atty. Gen. v. Cunningham*, 81 Wis. 440, 15 L.R.A. 560, 51 N. W. 724; *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 17 L.R.A. 145, 35 Am. St. Rep. 27, 53 N. W. 35.)

These matters are for political or party discipline, and not for the intervention of the courts. We cannot oust the said McLean from his chairmanship, for there is no other claimant, and the franchises and prerogatives of the state are not involved as he is in no sense a public officer. The term "public office" implies an authority to exercise some portion of the sovereign power of the state either in making, administering, or executing the laws, and that no such authority is possessed by the present complainant must be apparent to all. 6 Words & Phrases, 4933 et seq.; *Ritchie v. People*, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 461; 29 Cyc. 1364; 63 Am. St. Rep. 183, note; 30 Am. Dec. 47, note; *Atty. Gen. v. Drohan*, 169 Mass. 534, 61 Am. St. Rep. 305, 48 N. E. 279.

We are aware of our decision in the recent case of *State ex rel. Baker v. Hanna*, 31 N. D. 570, 154 N. W. 704, and in which we required the State Board of Immigration to meet and organize, but this was a ministerial body, and not a political committee.

That the control of the procedure and method of doing business of the state central committee was not contemplated by the legislature, or considered essential to the scheme of election that they were inaugurating, is also quite evident to us from the fact that in the first so-called Primary Election Act (Laws 1905, chap. 109), nothing whatever was said in regard to the election, membership, or organization of this body, while in the subsequent act (Laws 1907, chap. 109), the only provision was that they should meet at the state capitol and organize by selecting a chairman, secretary, and treasurer.

But it is argued that a practice which would allow the selection of a chairman who was not a duly elected member of the committee would destroy the equal representation in that body, and give to some one district two votes and two representatives. The force of this objection, however, is not apparent to us. In the first place if the committee may not choose as chairman one not duly elected, they cannot employ a secretary and a treasurer who are not such members, as the statute joins the three, and says expressly that they shall "select a chairman, a secretary, and treasurer;" and, as we have before stated, the secretary and treasurer have almost always been treated as purely ministerial officers. In the second place the selection as chairman of a meeting or committee does not necessarily carry with it any voting

power. In the third place if all of the members of the state central committee may take part in the selection of a chairman, and even if he be conceded a vote, how is the representative system violated any more than in the numerous cases where delegates and members at large are permitted to be chosen?

The petition is denied.

FISK, Ch. J., and BURKE, J., did not participate. Honorable W. L. NUESSELE, of the Sixth Judicial District, sat in their place.

P. S. JENSEN v. NORTHWESTERN UNDERWRITERS ASSOCIATION, a Corporation.

(159 N. W. 611.)

Complaint — action — cause of — stating — contract — land purchase — corporate stock.

1. Complaint examined, and *held* to state a cause of action on a contract of the defendant to purchase land, and not of the plaintiff to purchase corporate stock.

Counterclaim — cause of action — defense.

2. Counterclaim examined, and *held* not to state a cause of action or defense.

Counsel — stipulation of — legal opinion — courts — not binding on.

3. A stipulation by counsel that, "if the plaintiff should recover, the defendant is entitled to be credited with the amount of the counterclaims set up in the answer," is held, under the facts of the case, to be merely the expression of a legal opinion or conclusion, and to be not binding upon either the trial or the appellate court.

Corporate stock — forfeiture — by-laws — special provisions — charter — directors — cannot delegate powers.

4. A forfeiture of corporate stock must, in the absence of a by-law to the contrary or a special provision in the charter, be declared by duly elected

Note.—The forfeiture of corporate stock is discussed in a note in 27 L.R.A. 305, and cases will be found therein discussing the power to forfeit, holding that the right to forfeit must come from the law and can be exercised only in the manner prescribed by law, the validity of the exercise of the power, redemption by the stockholder, and the effect of forfeiture on his personal liability.

directors and by the number required to conduct corporate business, and such directors cannot delegate their powers and duties in the premises.

Corporate stock — forfeiture — power to declare — nonpayment — charter — statutory requirements.

5. The power to declare the forfeiture of corporate stock for nonpayment of the amount due thereon must be exercised in strict compliance with the charter or statutory requirements.

Cross claims — interest — how computed — balance.

6. Interest is calculated on the balance of two cross claims from the date when both become due.

Action to recover on the contract for the sale and transfer of land.

Appeal from the District Court of Grand Forks County. *Charles M. Cooley, J.*

Judgment for Plaintiff. Defendant appeals.

Affirmed.

Statement of facts by BRUCE, J.

This is an appeal from an order denying the motion of the defendant for a new trial or for judgment notwithstanding the verdict. This opinion is written after a rehearing.

The complaint alleges:

1.

That the defendant is a corporation organized under the laws of the state of North Dakota.

2.

That heretofore and in the fall of 1912, plaintiff purchased of defendant seventy-five allotments of stock, each allotment consisting of one share of plaintiff's capital stock and one share of the capital stock of the Northern Fire & Marine Insurance Company, at the agreed price of \$28 per allotment, or a total of \$2,100. It being then and there agreed that the same should be paid for only as sold by plaintiff to other purchasers, that plaintiff should account to defendant for the sum of \$28 for each allotment so sold, either in the form of cash or other settlement taken from such purchaser acceptable to defendant.

3.

That under the aforesaid agreement during the month of February, 1913, plaintiff sold thirty-eight allotments of said stock, of the value of \$1,900, at the agreed price of \$50 per share for a total sum of \$1,900. Settlement being taken therefor in the form of farm lands, and that said entire settlement was turned over and accepted by the defendant, with the agreement and understanding that defendant should account in cash to plaintiff for the difference over and above the price plaintiff had agreed to pay to defendant for the said stock, which said excess amounted to the sum of \$836.

4.

That the said sum of \$836 so due from defendant to plaintiff, though duly demanded, has not been paid nor has any part thereof.

Wherefore, plaintiff demands judgment in his favor and against the defendant for the sum of \$836, with interest thereon from the 1st day of March A. D. 1913, together with the costs and disbursements of this action.

The amended answer is as follows:

1.

The said defendant admits paragraph 1 of the said complaint.

2.

The said defendant admits that in the fall of 1912 the said plaintiff purchased of the said defendant seventy-five allotments of stock, each allotment consisting of one share of defendant's capital stock and one share of the capital stock of the Northern Fire and Marine Insurance Company, at the agreed price of \$28, per allotment, or a total of twenty-one hundred and no-100 (\$2,100) dollars, and alleges in respect thereto that the said plaintiff gave his promissory note to the said defendant for the said sum of twenty-one hundred and no-100 (\$2,100) dollars, whereby he promised to pay the said sum on demand to the said defendant. That the said plaintiff has not paid said note nor any part thereof, excepting the sum of *seven hundred twenty-eight dollars*; that by reason of the nonpayment of said note and the balance due thereon, the said stock so purchased was duly canceled for nonpayment.

3.

For and as a counterclaim herein the said defendant re-alleges the matters set forth in paragraph 2 of the answer, and specifically alleges that on or about the 11th day of November, 1912, at Grand Forks, North Dakota, the said plaintiff gave, executed, and delivered his promissory note to the said defendant for the sum of twenty-one hundred dollars (\$2,100), whereby he promised to pay to the order of the said defendant such sum on demand; that no part thereof has ever been paid, except \$728.

On or before the commencement of this action the said stock, for which said note was given, was duly canceled for the nonpayment of the balance, excepting allotments of stock duly issued pursuant to the order of said plaintiff.

The answer then pleads several counterclaims on various promissory notes, amounting in all to \$315, and then ends with the prayer: "Wherefore, the said defendant prays for dismissal of said plaintiff's action, and that the said defendant have judgment against the said plaintiff for the sum of three hundred and fifteen and no-100 (\$315) dollars, with interest on each respective note as hereinbefore alleged in the complaint, together with its costs and disbursements herein."

To this answer the following reply was filed:

"Now comes the plaintiff, and for his reply to the counterclaim of defendant.

I.

Denies each and every allegation, matter, and thing alleged or set forth in paragraphs 1 and 3 of defendant's answer herein, except as is hereinafter admitted, qualified or otherwise answered.

II.

Plaintiff admits the giving of the promissory note for \$2,100 to defendants at or about the time of the purchase of the stock as alleged in the complaint, but alleges that the same was given without any consideration whatsoever other than that the same might appear on the books and among the assets of the defendant, for the purpose of constituting an apparent offset for the transfer of said stock, but that the

said note was not given in payment for or in consideration of the purchase of said stock, it being agreed and understood by and between plaintiff and defendant at the time of the said purchase that the stock should be retained in the possession of the defendant until sold by plaintiff, and that settlements for such stock so sold by plaintiff should be turned in to defendant, to apply upon the purchase price due from plaintiff to defendant for said stock, in manner as alleged in paragraph 2 of the complaint.

III.

That said seventy-five allotments of stock have been paid for in full, with the exception of ten allotments, which have not yet been sold by the plaintiff, and which still remain in the possession of the defendant, subject to the condition of the original agreement as hereinabove and in the complaint set forth.

Wherefore, plaintiff demands that defendant take nothing in this action, but that plaintiff be given judgment as demanded in the complaint.

The jury returned a verdict against the defendant and appellant for the sum of \$592.87, which, after the allowance of interest, was the amount sued for by the plaintiff (\$836), less the amount of the several notes counterclaimed (\$315), and the liability for which was admitted by the plaintiff.

II. A. Bronson, for appellant.

A party cannot be permitted to establish written agreements covering the entire subject-matter of the litigation in detail, and then proceed to prove parol contemporaneous agreements to set aside such valid written agreements; nor can such agreements be set aside or overcome by proof of a custom indulged in by plaintiff. *Comp. Laws* 1913, § 5889; *Gile v. Interstate Motor Car Co.* 27 N. D. 126, L.R.A.1915B, 109, 145 N. W. 732; 21 *Am. & Eng. Enc. Law*, 1089; 11 *Am. & Eng. Enc. Law*, 489; 27 *Cyc.* 867; *Richards v. Killam*, 10 *Mass.* 239, 6 *Am. Dec.* 119; *Clark v. Sherman*, 5 *Wash.* 681, 32 *Pac.* 771; 4 *Wigmore*, Ev. §§ 24, 25 p. 3409; *Lowe v. Jensen*, 22 N. D. 148, 132 N. W. 661; *Yancey v. Boyce*, 28 N. D. 187, 148 N. W. 539, *Ann. Cas.* 1916E, 258; *Tharp v. Blew*, 23 N. D. 3, 135 N. W. 659.

The written evidence of indebtedness is the note; and applying principles analogous concerning mortgages, when a note and mortgage conflict in their terms, the note controls. 27 Cyc. 1058; *Graham v. Fitts*, 53 Fla. 1046, 43 So. 512, 13 Ann. Cas. 151; *Muzzy v. Knight*, 8 Kan. 456; *Meyer v. Graeber*, 19 Kan. 165; 2 Jones, *Mortg.* § 1179a.

Where a contract refers to another instrument as a part of itself, the terms of such instrument are incorporated in the contract. *Moore v. Ramsey County*, 104 Minn. 30, 115 N. W. 750.

The subscriptions for stock and the note given by the plaintiff were valid and binding obligations, and could not be fictitious subscriptions. *Comp. Laws* 1913, § 10,003.

Inconsistent defenses may be pleaded, and where no motion was made on the trial, either to strike out or to compel an election, all objections are waived. 31 Cyc. 225; *J. H. Clark Co. v. Rice*, 127 Wis. 451, 106 N. W. 231, 7 Ann. Cas. 505.

The facts alleged, and not the relief demanded, determine the nature and quantity of relief to be granted. 31 Cyc. 111.

In such cases, the procedure which permits a forfeiture of corporate stock is definitely outlined and requires definite steps to be taken by the board of directors, at a properly called meeting, with notice to the stockholder.

But, the situation here presented is more in the nature of a rescission and cancelation of a contract, for nonperformance. 10 Cyc. 499, 935, 943; 26 Am. & Eng. Enc. Law, 2d ed. 929; *Comp. Laws* 1913, §§ 4526, 4529, 4843.

There was only one issue in this case on the trial, and that was whether or not plaintiff, by a preponderance of the evidence, had established his express contract. The plaintiff had alleged an express contract; the defendant had denied this, and had pleaded certain facts by way of explanation, and in a negative manner.

The burden of proof still remained upon plaintiff throughout the case. The court, by its charge, created two issues, and placed an undue burden upon defendant, before the jury. 38 Cyc. 1751; *Wall v. Hill*, 1 B. Mon. 290, 36 Am. Dec. 578.

"Where plaintiff sues upon a demand bearing interest and defendant pleads a discount not bearing interest, plaintiff is entitled to calculate interest on his whole demand up to the time of the verdict;

conversely, where the plaintiff's demand does not bear interest, and the defendant pleads a demand drawing interest, the jury must give interest on the set-off at the time the verdict is rendered in the action, and reduce the plaintiff's demand by the amount of the set-off and interest." 34 Cyc. 758; *Russell v. Rogers*, 1 Nott & M'C. 24; *Morse v. Ellerbe*, 4 Rich. L. 600.

The fact that the defendant in the amended answer pleaded the cancelation of said note and stock certificate does not in any sense amount to an admission or tend to prove an admission. *Abbott*, Trial Brief, § 8910; 1 *Thomp. Trials*, 2d ed. § 1007.

Plaintiff cannot be permitted to prove an implied contract, based upon his custom of doing business in other transactions, or any oral arrangement made at the time of entering into the written contract, to offset, change, or contradict the terms of such written contract. *Comp. Laws* 1913, § 5889; *Gile v. Interstate Motor Car Co.* 27 N. D. 126, L.R.A.1915B, 109, 145 N. W. 732.

W. J. Mayer, for respondent.

The answer does not state a cause of action or defense, even though the pleading bears the marks of a counterclaim. But plaintiff has replied that the note was given without consideration,—a charge that is admitted by the motion for judgment on the pleadings. *Storey v. Murphy*, 9 N. D. 115, 81 N. W. 23.

There was never any intention of counsel to stipulate that defendant might recover upon the note, and at most the stipulation is a mere assumption or conclusion, or opinion as to the law, and is not binding either upon counsel or the court. *Prescott v. Brooks*, 11 N. D. 93, 90 N. W. 129.

"When a corporation is authorized by the terms of subscription or otherwise, to forfeit stock for nonpayment, it may either forfeit the stock or recover the amount of the subscription; but it cannot do both." *Comp. Laws* 1913, § 4526.

"The general power to do any act or to make any contract is in the board of directors." 21 *Am. & Eng. Enc. Law*, 2d ed. p. 503.

"The duties of the secretary are to keep the corporation records and to carry into operation the votes of the directors." 21 *Am. & Eng. Enc. Law*, 2d ed. p. 561; 26 *Am. & Eng. Enc. Law*, 2d ed. p. 929.

"The power to declare a forfeiture of a share for nonpayment of the

amount due thereon must be exercised in strict compliance with the charter or statutory requirements." 26 Am. & Eng. Enc. Law, 2d ed. p. 929.

"Interest is calculated on the balance of two cross claims where both are allowed, from the date when both became due." 19 Enc. Pl. & Pr. 810; Tucker v. Jewett, 32 Conn. 563; Meriwether v. Bird, 9 Ga. 594; Adkins v. Ware, 35 Tex. 577; Brown v. Montgomery, 19 Tex. Civ. App. 548, 47 S. W. 803; Whaley v. Broadwater, 78 Ga. 336.

"Admissions made in a pleading will bind the party in a suit in which they are filed, though such pleadings have been stricken out or withdrawn." 1 Am. & Eng. Enc. Law, 2d ed. p. 719.

BRUCE, J. (after stating the facts as above). The first three assignments of error were as follows:

1.

That the court erred in denying the motion of the defendant made at the beginning of the trial for judgment on the pleadings, upon the ground and for the reason that, under the pleadings, it affirmatively appears that if said stock was sold as plaintiff alleged, then said stock of the plaintiff was not canceled, the note given therefor \$2,100 remained unpaid, and not canceled, and there was due and unpaid on the same \$1,372, with interest.

That under the pleadings the counterclaim for said note of \$2,100 was a proper offset to the demand of said plaintiff, and that therefore the said defendant in any event had the right as a matter of law to apply said credit of the plaintiff upon the said stock and note so given. Furthermore, the complaint does not set forth an action for money had and received or common-law action of accounting, wherefore the court erred.

2.

The court erred in overruling the motion of the defendant made at the close of plaintiff's case for the dismissal of the action, made upon the ground and for the reason that the plaintiff failed to establish by his evidence a cause of action as alleged in his complaint, and that the denial of said motion was contrary to law under the evidence adduced.

3.

The court erred in overruling the motion of the defendant for a directed verdict made at the close of the case, upon the grounds and for the reasons set forth in said motion.

There is obviously no merit in any of these assignments. They are all based upon a common misunderstanding of the pleadings and on the supposition that the action is based on the plaintiff's contract to purchase stock from defendant, and that the defendant has pleaded and established a right to recover under a counterclaim which is based on the \$2,100 note. They also ignore the fact that the plaintiff in his reply expressly alleges and has introduced competent evidence in support of the proposition that the said \$2,100 note "was given without any consideration whatsoever other than that the same might appear on the books and among the assets of the defendant for the purpose of constituting an apparent offset for the transfer of said stock, but that the said note was not given in payment for or in consideration of the purchase of said stock; it being agreed and understood by and between plaintiff and defendant at the time of the said purchase that the stock should be retained in the possession of the defendant until sold by plaintiff, and that settlements for such stock so sold by plaintiff should be turned in to defendant to apply upon the purchase price due from plaintiff to defendant for said stock in manner as alleged in paragraph 2 of the complaint."

Counsel for appellant indeed has mistaken matters of inducement for material issues. The agreement upon which plaintiff's cause of action is based is not the contract for the purchase of the seventy-five allotments of stock, but the agreement on the part of the defendant to pay plaintiff for the land which plaintiff had bought with the stock which had been sold to him, and had surrendered to the defendant on the promise by such defendant that it would pay him for such land the difference between its value and the \$28, which plaintiff had agreed to pay for each of the seventy-five allotments sold to him, and thirty-eight of which he had in turn traded for said land. Though it is true that the original contract or agreement was in writing, the two agreements are in no way inconsistent with one another. The action indeed is not based on paragraph 2 of the complaint, which sets forth matter

of inducement merely, but on paragraph 3, which alleges: "That under the aforesaid agreement during the month of February, 1913, plaintiff sold thirty-eight allotments of said stock, of the value of \$1,900, at the agreed price of \$50 per share for a total sum of \$1,900, settlement being taken therefor in the form of farm lands, and that said entire settlement was turned over and accepted by the defendant, with the agreement and understanding that defendant should account in cash to plaintiff for the difference over and above the price plaintiff had agreed to pay to defendant for the said stock, which said excess amounted to the sum of \$836."

The situation then, as testified to by the plaintiff (it was for the jury to say whether his version of the story was true or not), was as follows: Jensen, the plaintiff, had subscribed for seventy-five allotments of stock at \$28 an allotment, or at a price of \$2,100. He had given a note for \$2,100 therefor, but this was merely for bookkeeping purposes, the agreement being that he should only pay for the stock as it was sold by him. Prior to the transaction in question, he had sold and accounted to the defendant, the Northwestern Underwriters Association, for twenty-six allotments. This left a balance over of forty-nine allotments. In the particular transaction and the one that is sued upon, he sold to Fox thirty-eight allotments for land which was valued at \$1,900, or at a price of \$50 an allotment. This land he turned over to the defendant company, and the defendant company agreed to pay him the difference between the \$28 an allotment, the price he had agreed to pay, and the \$50 an allotment for which the allotments had been sold to Fox and which was in the shape of the land which had been turned over to the defendant company. This difference amounted to the sum of \$836, and this sum the defendant owes the plaintiff, less an offset for money loaned of \$315.

Nor, under the pleadings and the evidence in the case, can the defendant offset the promissory note for \$2,100. This counterclaim is somewhat irregularly pleaded as far as form is concerned, but we do not disallow it on that ground. The reason for disallowance is that it pleads nothing in substance, and that the evidence does not supply the want. It seeks to recover on a note the consideration of which was capital stock, and yet it positively states that "the stock was canceled." This latter allegation destroys the force of the whole counterclaim, as

it can mean nothing else but that the consideration had failed. The plaintiff, too, testified that the note was given merely as a memorandum, and that the true agreement was that the stock should only be paid for as it was resold, and whether this testimony was true or not was for the jury to determine.

Nor can we hold that the plaintiff is precluded from denying this counterclaim or set-off on account of the stipulation of counsel, which was made at the end of the trial and which was to the effect that "it is understood between the parties that, if the plaintiff should recover, the defendant is entitled to be credited with the amount of the counterclaims set up in the answer, and, if the plaintiff does not recover, that the defendant is not entitled to any judgment on such counterclaims, for the reason that the amount thereof has been credited to the plaintiff on the books of the company."

On account of the fact that the defendant claimed in his answer that the stock had been canceled, and thus conceded that the consideration for the note had failed; on account of the fact that in its prayer for affirmative relief the defendant only asked for the amount of the counterclaims which were properly pleaded, and did not include the amount of the note in question, and from a perusal of the evidence and the state of the record generally, we are satisfied that counsel never at any time intended that this stipulation should include the \$2,100 note.

Even if such were the intention, neither the jury nor the trial judge were bound thereby. The stipulation, if construed to include the \$2,100 note, was, at the most, an agreement upon a legal conclusion, and what is more it was a legal conclusion which was clearly erroneous. Stipulations of this kind are always and can always be properly disregarded by the trial courts. If they can be disregarded by the trial judges, much more can they be disregarded by the appellate tribunals. Appellate tribunals, indeed, are as a rule only justified in reversing judgments if errors of law have been committed and they will never reverse a judgment where no error of law has been committed, and merely because counsel have inadvertently stipulated an erroneous opinion as to the law of the case.

See *Prescott v. Brooks*, — N. D. —, 94 N. W. 88; *Owen v. Herzihoff*, 2 Cal. App. 622, 84 Pac. 274; 36 Cyc. 1285, 1286.

As we view the evidence it is hardly necessary to decide whether the

stock subscription was in fact canceled. To avoid all controversy, however, we will pass upon the question and upon the correctness of the court's instruction to the jury, that

"You are further instructed that there is no evidence in this case showing that there was in fact a valid cancelation of this stock or the stock subscription."

We hold that there was no valid cancelation.

The testimony upon which defendant relies to establish cancelation is as follows:

Q. What did you do to cancel them?

A. Well, we had these in the office, these certificates were never taken away from the office. We asked for payment of the note which we didn't get. The certificates were then placed back in the subscription book, and marked canceled for nonpayment and the note attached thereto.

Q. How did you do it?

A. I presume I told the bookkeeper to do it, I didn't do it myself, I don't do any of the mechanical work up there.

Q. Did the bookkeeper make the entries concerning this matter?

A. I presume he did.

Q. I understand then, Mr. Hand, that you—It was you really that made the entries of cancelation in the first instance on these certificates, or were they entered under your direction first by Mr. Mason?

A. On the certificates? That writing on the certificates seems to be mine. I think it is.

Q. You acted upon your own discretion in doing that?

A. I decided it, yes, I generally did at that time I think,—decide those questions when they came in.

Each of the three applications for stock provide:

"That if settlement herein provided should not be completed in cash within the time agreed upon, the said Burt Mason, fiscal agent, is hereby authorized to surrender the certificates back for cancelation to the companies which have respectively issued the same."

Each of these applications also contained this provision:

"Said total payments to be made as follows:

"Notes for \$700, due October 1, 1913."

And each subscription is addressed as follows:

"I, P. S. Jensen, of Grand Forks, North Dakota, hereby subscribe with Burt Mason, fiscal agent."

Counsel for the respondent contends that the forfeiture provided for is conditioned on the failure of the plaintiff to pay, presumably Burt Mason, the fiscal agent, the sum of \$700; that the authority to confer, if expressly conferred at all, is conferred not upon Mason or any other person, but upon the respective companies, the Northwestern Underwriters Association and the Northern Fire and Marine Insurance Company; that the matter of forfeiture is not prescribed in the written agreement.

He calls attention to § 4526 of the Compiled Laws of 1913, which provides that: "When a corporation is authorized by the terms of subscription, or otherwise, to forfeit stock for nonpayment, it may either forfeit the stock or recover the amount of the subscription, but it cannot do both." He argues that a cancelation of the stock in February or March, 1913, and prior to the time the subscription price was due under the conditions of the subscription contract, was not justified by that contract. He admits that defendant had in its possession at that time a certain promissory note executed by plaintiff for \$2,100, payable on demand, and that there is some evidence in the record that this note evidenced the aggregate amount due from plaintiff to defendant on his stock subscription. He alleges, however, that there is nothing to show whether the several notes called for in the subscription contract which were to be due October 1st, were not executed in accordance with that contract, and he argues that whether they were or not defendant's stipulation to submit to a cancelation for nonpayment on October 1, 1913, could not be altered or made to apply to the conditions of the note given a month and eleven days after, and not for \$700 but for \$2,100, and not payable October 1st, but payable on demand, without a new express agreement to that effect.

He argues also that forfeiture clauses are strictly construed; that the subscription contract conferred the right to forfeit upon the respective companies, and upon the companies alone. He cites authorities to the effect that "the general power to do any act or make any contract is in the board of directors." 21 Am. & Eng. Enc. Law, 503. And that "the forfeiture must be declared by duly appointed or elected directors and by the number required to conduct corporate business.

The directors cannot delegate their powers and duties in the premises. It is also necessary that the resolution should designate the stock to be forfeited." 26 Am. & Eng. Enc. Law, 929. He also cites authority to the effect that "the power to declare a forfeiture of shares for non-payment of the amount due thereon must be exercised in strict compliance with the charter or statutory requirements." Ibid. We think he is right in all of these contentions, and that the instruction of the court was therefore correct.

Counsel for appellant, however, seems almost to concede this fact. He argues, however, that the cancelation was not a cancelation of his stock, but of the contract for its purchase.

Whether this would make any difference in the case it is not necessary for us to say, as the answer at no time claims that this contract for the purchase of the stock had been canceled, but merely the stock itself.

It is next claimed that the court erred in his instruction as to the burden of proof and the issues involved in the case. We find no error. The criticism of appellant is based largely on the theory that the original written contract for the purchase of the stock was sued upon, which, as we have before stated, was not the case.

The jury was certainly justified in holding that the action was based on the land transfer, that it was Jensen's rather than the defendant's stock which was sold, and that the original contract was still in operation and could still be relied upon for the purpose of determining what Jensen should be charged by the company for that stock. Hand, the secretary of the company, indeed, expressly testified that the reason he consented to the Fox land deal was that Jensen might pay the company his indebtedness including that on the \$2,100 transaction.

There was at the most a conflict in the testimony, and it was for the jury to decide whose version of the story was correct. This matter was properly submitted to the jury by the instructions, and the verdict of the jury must be controlling. The issue in the case as presented by the trial judge in these instructions was whether or not "the plaintiff, Jensen, sold to Mr. Fox the thirty-eight allotments out of the seventy-five allotments which he had therefore purchased from the defendant company, or whether or not the thirty-eight allotments which were sold to Mr. Fox by him were really shares belonging to the company, and not shares he had theretofore purchased. If you should find from quite

fair preponderance of the evidence in this case that the plaintiff, Jensen, did sell to Mr. Fox the thirty-eight allotments out of the seventy-five allotments purchased by him from the defendant, then you should find for the plaintiff, but if you should find that a new arrangement had been made between the parties, and that the thirty-eight allotments which were sold by the plaintiff to Mr. Fox were the shares of the company, and that the sale was made under an agreement between the company and Jensen that he was to receive as compensation for his services in making such sale a cancelation of his indebtedness on the five promissory notes which are set up as a counterclaim, then you should find for the defendant."

The testimony of Hand, the secretary of the company, to us clearly establishes a liability. He testified. "I meant when we canceled this deal here, we never severed our connection with Mr. Jensen. We wanted to pay his account that he owed us on this note for \$2,100, and pay the notes where we had advanced him money." Again he testifies, "I told him that we had canceled his stock certificates for nonpayment of the note. I told him that we asked him for payment of the other note, the notes for money which we had advanced him. Then he told me about this Fox deal. He said he had been talking with Fox, and if he had a good man down there, he could clean the deal up and pay us what he owed us. I immediately got interested in it because it would clean up his account, and I sent Mr. Hanlon, who was in the employ of our company at the time on a salary, to meet Mr. Fox and close up this land deal, and also to appraise the land and find out what it was worth." I told Jensen we cleaned up what he owed us. I told him I had canceled the stock. I think that is the reason he came in, because we had written to him about the nonpayment of this note. I think it was probably he was told that the stock had been canceled, and it was then that he started talking about the Fox deal. Then we talked about the advances that he still owed. I did not say anything about what he should get out of this Fox deal. Only that was our agreement before he went that it was to clean up his indebtedness to the company, didn't say anything more about it at all."

From all of this we can infer nothing else than that the cancelation of the stock, if any, was kept in abeyance until after the closing of the Fox deal, and that as far as that deal was concerned, the old agreement

was still in force. If the sale of the stock was canceled and was considered canceled by Hand, how did he expect to have the \$2,100 note paid thereby, and if the stock was canceled was not the debt under the \$2,100 note canceled also? Hand does not offer a scintilla of testimony in regard to any other consideration for Jensen's services, or that anything was said about the company stock rather than that of Jensen being transferred to Fox.

Appellant next contends that the learned trial judge erred in his charge to the jury in regard to the computation of interest.

"Plaintiff," he says, "sued for \$836, and defendant set up counterclaims aggregating \$315. These counterclaims were not denied in the reply, so they stood admitted in the pleadings. They are based on promissory notes given by plaintiff to defendant in November, December, and January, preceding the Fox deal, and are for sums varying from \$25 to \$100, drawing interest before maturity at 7 and 8 per cent and after maturity at 12 per cent.

"The court figured interest on these notes up to the time of the commencement of suit, defendant argues that interest should have been computed up to the date of the verdict, a little over two years later. The difference would amount to twenty odd dollars.

"The court, in computing interest, assumed that the date of the application of the amount due on these notes to plaintiff's claim should be governed by the date of the commencement of the action, March 18, 1913."

We think there was no error in this instruction. "Interest is calculated on the balance of two cross claims, where both are allowed from the date when both became due." 19 Enc. Pl. & Pr. 810.

Error is next assigned on the overruling of defendant's objection to the introduction in evidence of the original answer of the defendant.

Counsel, however, does not argue any particular prejudice from the admission of this answer, and we fail to see any.

It is next objected that the court erred in allowing in evidence testimony which tended to vary and change the original written agreement for the purchase of the stock, and which he claims was evidenced by the note. This evidence, however, was competent in relation to the oral agreement which was sued upon, and, as we have before said, it was on the oral, and not the written, contract that the action was based.

It is also urged that the court erred in excluding certain evidence offered by the defendant. We are satisfied, however, that the matters involved have already been sufficiently gone over, and that no prejudice has been shown.

The judgment of the District Court is affirmed.

CHRISTIANSON, J. I concur in the result.

PIERCE COUNTY v. McHENRY COUNTY.

(159 N. W. 841.)

Action — venue — change of — by stipulation — from one county to another — disbursements — jurors — bailiffs — other necessary expenses — reimbursement — must be made.

In an action brought in McHenry county, venue was changed upon stipulation to Pierce county, where a jury trial was had. A certified bill of disbursements for jurors, bailiffs, and other expenses was presented to McHenry county to reimburse Pierce county. Payment was refused. McHenry county contends that as all parties litigant in said action were nonresidents of McHenry county and as the change of venue was ordered upon a stipulation, it is not liable under § 7810, Comp. Laws 1913.

Held, That this recovery is one within the terms of and authorized by the statute, and that McHenry county must reimburse Pierce county for such disbursements.

Opinion filed October 14, 1916.

An appeal from the District Court of McHenry County, *Buttz*, Special Judge.

Affirmed.

John Thorpe, for appellant.

The court erred in holding that the change of venue taken in the original action for the costs of which this action was brought, was taken pursuant to law. *Greenwood County v. Elk County*, 63 Kan. 857, 66 Pac. 1018; *Portage County v. Columbia County*, 148 Wis. 329, 134 N. W. 908, Ann. Cas. 1913B, 185; Comp. Laws 1913, § 7810.

No change of venue can be taken after the time for answer has expired. 40 Cyc. 144.

The clerk of court is required to swear to the correctness of a bill for costs, presented by one county against another. Code Civ. Proc. 1877, § 396.

A certificate by the judge is not sufficient. Certifying to a matter is merely testifying to its truth. 2 Words & Phrases, 1033.

The "allowance" of such a bill raises a different question. 1 Words & Phrases, 344.

H. B. Senn, H. B. Nelson, and L. N. Torson, for respondent.

The change of venue in the case in which the costs are in this present case sought to be recovered was the case of *Pope v. Bailey-Marsh Company*—a foreign corporation—having no fixed county residence in this state. In such case the proper county for trial is the county named in the complaint. The plaintiff had the right to choose the county. By stipulation of parties and by the order of the court based thereon, the place of trial was changed from McHenry county to Pierce county, and was therefore taken "pursuant to the law." Comp. Laws 1913, § 7417; *Ivanusch v. Great Northern R. Co.* 26 S. D. 158, 128 N. W. 333.

In a proper action the defendant may demand and secure a change. This right is absolute and equally applies to natural persons and corporations. And where a change is effected by stipulation, and by the order of the court based on such stipulation, it is just as much in "pursuance of law" as though defendant had demanded it and made its motion therefor in the usual way. *Smail v. Gilruth*, 8 S. D. 287, 66 N. W. 452; Comp. Laws, 1913, § 7418; Comp. Laws, 1913, § 7936, subds. 17 and 33; *Eastman v. Sherry*, 37 Fed. 845; *Hanchett v. Humphrey*, 93 Fed. 896; *Spaulding v. Tucker*, 2 Sawy. 50, Fed. Cas. No. 13,221; *Vaughn v. Hixon*, 50 Kan. 773, 32 Pac. 358; *Duffy v. Duffy*, 104 Cal. 602, 38 Pac. 443.

The courts of all the counties in this state were open to plaintiff, and he had the right to select. This is not only statutory, but the right exists under the Constitution. N. D. Const. art. 1, § 22.

Goss, J. This is an appeal from an order overruling a demurrer to plaintiff's complaint. The material facts admitted by the demurrer

are that a civil action for damages was commenced in the District court of McHenry county by a resident of Ward county against two non-resident defendant corporations. An order of the district court was entered upon stipulation of the parties, changing the venue from McHenry to Pierce county, in the same judicial district. A protracted trial was had to a jury. Pierce county has taxed its necessary and actual disbursements occasioned by said trial, inclusive of juror's and bailiff's *per diems* at the sum of \$670.65. This bill was duly presented to the presiding district judge and by him was certified as "true and correct items of expense incurred by Pierce county in said trial." Understanding that McHenry county desired to litigate its liability for payment of these costs, an order for their payment was not made. The sole question presented is the liability of the defendant county under these admitted facts.

Decision turns upon the construction of § 7810, Comp. Laws, 1913. Section 395 of the Code of Civil Procedure of 1877 controlled until the Code revision of 1895 became effective January 1, 1896. Section 395 read: "Whenever a change of venue is granted in any case pending in the district courts, all the costs and fees paid by the county to which the case is ordered for trial shall be charged to the county from which such case is sent." This provision did not cover expenses so incurred in criminal cases, and there was no exception as to kinds of civil cases; all were covered by this statute. Section 7810, Comp. Laws, 1913, came into existence as § 5595, Rev. Code 1895, and as change in the prior law amounting to new legislation on the subject, according to the report of the joint legislature committee proposing the statute in its present form. See House Journal of 1895, Appx. page 119, § 423. And this new statute reads: "In *all* actions or proceedings, *including criminal actions*, when a change of venue is had or made by the order of any court or of any judge pursuant to law, *except* in cases when such change is made because such action was not brought in the proper county, the court in which such action was commenced shall pay to the county in which the same is tried, the following expenses arising out of such change of venue: "And eight itemized heads of expense follow, covering the items of cost in suit. The concluding portion thereafter reads: "But no costs shall be paid to the

county to which a change of venue is had which are not properly chargeable against such county."

This statute was carefully drawn to cover costs in both civil and criminal actions, and contains only two specific exceptions, *i. e.* (1) "Cases when such change is made because such action was not brought in the proper county;" and (2) no costs not properly chargeable against the county to which the change is taken shall be charged against the county from which it is removed. While the cause of action in which the costs were incurred was transitory and suit could have been brought in Ward county by the plaintiff, a resident of Ward county, nevertheless it was properly brought in McHenry county within the meaning of this statute. There is no statutory exception excluding reimbursements in this case under these circumstances. And to hold that the facts make it an exception is the equivalent of reading another and further exception into the statute, and one not found there. The clause "pursuant to law" does not signify that the statute does not cover cases where a change of venue is ordered upon a stipulation of parties or of counsel. To so hold would narrow the scope of this statute broad and comprehensive in terms. The statute is as definite as it is broad. All actions or proceedings, including criminal actions, are covered by it, "when a change of venue is had or made by the order of any court or of any judge pursuant to law." As a transfer or change of venue by order of court or judge based upon a written stipulation is a change had or made pursuant to law, and is in nowise contrary to or unsupported by law, and as under the facts the case is not within the exceptions contained in the statute, it must be one included therein, and with the result that the defendant county must be held indebted to the plaintiff county.

Section 5595, Rev. Codes 1895, § 7810, Comp. Laws, 1913, was taken literally from § 2940 of the Wisconsin Statutes of 1878. There are three decisions of that state upon that statute; *Green Lake County v. Waupaca County*, 113 Wis. 425, 89 N. W. 549; *Winnebago County v. Dodge County*, 125 Wis. 42, 103 N. W. 255, and *Portage County v. Columbia County*, 148 Wis. 330, 134 N. W. 908, Ann. Cas. 1913B, 185. The reasoning upon which the last decision is based is conclusive against this appellant. An action was improperly brought in Dane county, and on a showing thereof was transferred to Columbia county

as the proper county for trial. Then, on stipulation, a change of venue was taken to Portage county, where it was tried, and which county sought to recover the costs incurred on trial from Columbia county. It was held that the situation was one not covered by the statute, and recovery could not be had, because the action was not commenced in Columbia county, though it was the county in which the action should have been begun. The following is from the opinion: "An analysis of the statute will disclose that upon a change of venue the costs of trial can be charged back to but one county; namely, the county in which the action was properly begun. The legislative scheme deals only with counties in which the action was commenced, and it divides such counties into two classes, those in which the action was properly begun and those in which it was not properly begun, and it exempts the latter from liability. The result is that when an action is tried in a county on a change of venue that county must be able to find a county in which the action was properly begun, in order to relieve itself of liability for the costs of trial. If it cannot find such a county it must bear the burden itself, for no provision is made for charging back the costs against any other county. In other words, the legislature has said: If the action was properly brought in the county in which it was commenced, such county can be charged with the costs of trial upon a change of venue; but if it was not properly brought there it cannot be charged. There the statute ends. It makes no provisions for charging the costs to any other county. A situation such as is before us in the instant case was not provided for. But it is said the court should construe the word "commenced" to mean properly commenced, and should hold that the present action was not properly commenced till it reached Columbia county on a change of venue. The insuperable obstacle to such construction is that the legislature recognized the fact that an action could be either properly or improperly commenced in a county by providing for a liability for costs in the one case and for exemption therefrom in the other; and that in fixing liability it did not go beyond the county in which the action was commenced, whether that was a proper or improper one. Hence, we cannot extend the provisions of the statute by a construction that is negated by the act itself."

While it may seem unreasonable, arbitrary, and unjust to exact this

payment by McHenry county of costs in a cause of action arising elsewhere, and with both the plaintiff and defendants nonresidents of McHenry county, in effect requiring that county to pay for litigation between nonresidents, simply because the statutes permit the suit to be brought in the first instance in McHenry county, yet it would be equally unreasonable, unjust, and arbitrary to hold that Pierce county, under such circumstances, should be obliged to bear this expense. Both plaintiff and defendant stand upon an equal footing on the merits, and an injustice must be done one or the other. Upon that situation the statute has spoken, and the legislature has elected to, by uniform rule, hold the county responsible in which the action was commenced. It must be assumed that this situation was considered by the legislature before the rule was declared. The order appealed from is affirmed.

CHRISTIANSON, J., did not participate.

**MICHIGAN IDAHO LUMBER COMPANY, a Corporation, v.
NORTHERN FIRE & MARINE INSURANCE COMPANY,
a Corporation.**

(160 N. W. 130.)

Fire insurance policy — loss under — settlement and adjustment of loss — amount — action to recover — complaint in — not on policy.

1. Complaint examined, and *held* to state a cause of action upon a settlement and adjustment of a fire insurance claim rather than upon the fire insurance policy itself.

General agent — draft given by — in payment of amount of adjustment — insurance company — authority of — delivery of draft — implied authority — secret instructions — unknown to payee.

2. A general agent who has been given a draft with which to pay for the amount determined upon in a settlement and adjustment which has been made by him under the authority of an insurance company has implied authority to deliver the same, and his principal will be bound by a delivery, even though, prior to the same, the agent was instructed to hold up the draft, but such secret instructions were not known to the payee.

General agent — instructions to — powers — limitations on — not disclosed — apparent powers — not affected by — authority — scope of — insurance company — general agent of — implied authority — apparent authority — permitted by principal.

3. Instructions to or limitations on the powers of a general agent which are not disclosed cannot be permitted to affect apparent powers, and although the agent violates his instructions or exceeds the limits stated to his authority, he will yet bind his principal to a third person if his acts are within the scope of authority which the principal has caused or permitted him to appear to possess. A general agent of an insurance company has the implied authority to write temporary policies, and where he agrees that a loss will be covered pending negotiations for a larger policy, his principal will be bound thereby.

Insurance company — general agent — statements — in connection with business — risk — covered — promises of — to insured.

4. Where a general agent of an insurance company states that he will hold a risk "covered," he will be presumed to mean that the insured is at the present time protected against loss, and not merely that he will make a notation and at some future date issue a policy.

Loss by fire — adjustment — specified sum — contract to pay — warranty in policy — waiver of — fraud — mistake of fact — mutual mistake — as to law.

5. A settlement and contract to pay a specified sum on account of a loss operates as a waiver of any warranty in an insurance policy, unless such settlement was procured by fraud or was the result of a mistake of fact or of a mutual mistake as to the law.

Insurance company — claim against — for loss — examination by company — settlement without — deemed to be waived — fraud — absence of — breach of warranty in policy — cannot avail itself of — want of knowledge.

6. When a claim is made against an insurance company for a loss, the company is required to ascertain the facts as to any breach of warranty, and if it sees fit to pay the claim or to compromise it without examination, it must be deemed to have waived it, and in the absence of fraud it cannot afterwards avail itself of the breach, and it cannot urge payment or settlement by mistake on account of want of knowledge of such breach.

General agent — adjuster — facts known to — known to their company — deemed to be.

7. Facts which were known to the general agent of an insurance company and to its adjuster at the time of adjusting a loss will be deemed to have been known to the insurance company.

Company — defects — deemed to have known — before settlement — evidence.

8. Evidence examined, and the defendant company *held* to have actually known of defects complained of before settlement made.

Loss — adjusted — insurance company — policy holder — between — recovery — action for — upon new promise — not on policy.

9. Where a loss has been adjusted between an insurance company and a policy holder, such adjustment is a new and independent agreement; and the action for the recovery of the adjusted loss is a suit, not upon the policy, but upon the new promise or contract.

Opinion filed October 21, 1916.

Action to recover for a fire insurance loss.

Appeal from District Court of Grand Forks County, *Chas. M. Cooley, J.*

Judgment for plaintiff. Defendant appeals.

Affirmed.

Statement of facts by BRUCE, J.

This is an appeal from an order of the district court denying the defendant and appellants motion for judgment *non obstante veredicto* or in the alternative for a new trial, and which motion had been made after a verdict had been directed for the plaintiff. The claim arises out of a fire loss. The action was brought after the dishonoring by the defendant company of a draft which was given in settlement of the claim and in furtherance of an adjustment which had been made by its general agents and a hired adjuster.

The defense was that the draft was executed and delivered by mistake, and was procured by the plaintiff wrongfully and unlawfully; that the policy of insurance was not issued by the plaintiff at all, but to "John W. Prestel, J. T. Crosby, and J. S. Crosby, trustees, as their interests may appear;" that the defendant insurance company had never consented to the transfer of the policy to the plaintiff; that the policy in any event became invalid and void by reason of the fact that at the time of its issuance the mill property had been closed for two years, and was closed at the time of the loss; that an ill feeling existed between the community and the mill owners, which facts rendered the risk hazardous, and that these matters had been concealed from the defendant;

that at no time during the issuance of the policy were proper watchmen employed as required by the policy; that the premises were allowed to remain idle while the policy was in force without the consent of the defendant; that the mill was not on ground owned in fee by the plaintiff; that the said plaintiff did not state truly its interest in the premises, and by its proof of loss described said policy as issued to John W. Prestel, J. T. Crosby, and J. S. Crosby, trustees, and also stated in said proof of loss that the policy had been sold to the plaintiff since the issuance of the policy; that the plaintiff had not used reasonable means to save the property at the time of the fire; that proper proofs of loss had not been furnished and within the time required. There was also an offer to return and to pay into the court the amount of the premium.

On February 27, 1914, a policy of fire insurance was issued by the defendant company to John W. Prestel, J. T. Crosby, and J. S. Crosby, trustees, as their interest might appear, for the sum of five thousand dollars (\$5,000), and for a term of one year. This policy was issued by Douglas Bros. & Rice, insurance brokers, with offices in Chicago, Illinois. The policy was a prorate of fifteen thousand dollars (\$15,000), total insurance on buildings, machinery, and stock of a sawmill. Douglas Bros. & Rice had a general agency contract with the defendant company. Charles A. Dewing, of Kalamazoo, Michigan, was the president of the Michigan Idaho Lumber Company, and J. Stewart Crosby was the vice president. The plaintiff corporation was organized about February 25, 1913. It had delivered to it deeds to the sawmill property at Payette, Idaho, from and through J. W. Prestel, J. S. Crosby, and J. T. Crosby, trustees on October 23, 1913. Mr. Dewing, the president of the company, testified that at the time he purchased the property there was fire insurance upon the premises in other companies than the defendant, and all running to John W. Prestel, J. T. Crosby, and J. S. Crosby, trustees, and that these policies were turned over to the plaintiff corporation when the purchase was made, though they were not assigned, and that they were continued in the form in which they were originally written. On June 16, 1913, the plaintiff corporation gave a trust deed of the premises to the Continental and Commercial Trust & Savings Bank. This trust deed was recorded and was unsatisfied at the time of the fire though it was practically paid. Mr. Charles H. Garrett of Kalamazoo, Michigan, is a fire underwriter and acted as the agent of

the plaintiff corporation in securing the insurance. On February 21, 1914, and six days before the issuance of the policy, Garrett wrote Rice a personal letter inclosing a policy of fire insurance in a Pennsylvania company in amount twenty five hundred dollars (\$2,500), and running to J. W. Prestel, J. T. Crosby, and J. S. Crosby, trustees, and asked Rice if he could take care of a line of ten or twelve thousand dollars, expiring February 28th, concurrent with the inclosed policy, and stated that the property was largely owned by Dewing & Sons, of Kalamazoo, Michigan. On February 23, 1914, Rice wrote Garrett that they would take care of a line of ten thousand on the risk involved, and that five thousand would be placed in the Central National and five thousand in the defendant company. On February 24, 1914, Garrett wrote Rice, suggesting that they bind the insurance and carry it till the 1st of March and then date the policy from March 1st at 3 per cent. On February 25, 1914, Douglas Brothers & Rice answered that they would do so. On February 26, 1914, Garrett wrote to Rice that he did not desire the binder to be issued, but to date the policies from March 1st. On February 28, 1914, Garrett wrote Rice acknowledging receipt of two insurance policies, meaning the Central National and the defendant company policies, and in such letter stated that Mr. Dewing (the president of the plaintiff company) desired to remodel the form of the insurance as it did not cover in just the way he desired. There then followed a long-distance telephone concerning the risk, but in which nothing was said about the name of the assured, although Garrett informed Rice that he was sending him a policy that would contain the names of the parties and the necessary information. The policy of the defendant company, and which was issued in the names of John W. Prestal, J. T. Crosby, and J. S. Crosby, trustees, as their interest might appear, was delivered by Garrett to Dewing, the president of the plaintiff company, about the middle of March, and there is no evidence that Dewing complained of the names of the parties inserted therein. The memorandum application in the office of Douglas Brothers & Rice show Prestel et al. as the assured, and this application is signed by Garrett as broker. On March 21, 1914, Garrett wrote to Douglas Brothers & Rice, stating that the policies had been sent to them covering the Idaho plant; that the incorporated name of this company *now is the Michigan Idaho Lumber Company, and requested them to attach riders to the*

three policies, acknowledging the change in title and ownership. This letter is as follows:

"Please note that the three policies you have sent us covering on the Idaho plant at Fayette, the *incorporated name of this property now is the Michigan Idaho Lumber Company, Inc.* Will you kindly send us riders to be attached to the three policies acknowledging the change in title and ownership, and we will see to it that the said riders are properly attached to the said policies, which are Central National No. 635,762, Northern Fire No. 33,847, and Russian Transport No. 20,494. The policies are still here in our office. We are getting the new policies and figures in shape, as Mr. Dewing desires to have a new policy form and increase the insurance somewhat. These forms are now in parts being made up, and, as soon as they are in order, they will be sent to you for consideration and approval."

No such riders, however, were ever attached to the policy. On April 20, 1914, Garrett wrote Rice inclosing policy forms for the Michigan Idaho Lumber Company, and stated in the letter that they had been quoted a rate of $2\frac{1}{2}$ per cent; that they desired insurance written on the mill and machinery in the sum of seventeen thousand six hundred dollars (\$17,600), and that the present policies would be returned and canceled upon the receipt of the new policies. On April 22, 1914, Rice wrote Garrett, stating that he could probably take care of the risk at 3 per cent, and that *they were holding the risk covered*, awaiting advices from Garrett as to whether the assured would agree to pay the 3 per cent. On April 28, 1914, Garrett wrote Douglas Brothers & Rice concerning a statement sent for the premium, and said in the letter that the policy was canceled and that Douglas Brothers & Rice were holding the new printed forms, and asked them to send a credit memorandum in order that they might take up the policy with Mr. Dewing and return it to Douglas Brothers & Rice, and asking that in the meantime Douglas Brothers & Rice send them something to *show Mr. Dewing for the binder under the new form and insurance taken.* On April 29, 1914, Rice wrote Garrett in reply to his letter of April 28th, wherein he stated that the entire line had been taken care of May 1st, and policies would go forward on the next day. On April 29, 1914, early in the morning the sawmill building and plant and machinery therein sustained a loss by fire of an incendiary origin.

The notice of loss sent to the defendant company by Douglas Brothers & Rice gave the name of the assured as John Prestel et al. On June 27, 1914, Rice wrote Garrett, stating that the premium on the policy should be paid, and that if he should report the fact to the New York office, that the premium had not been paid, it would have a material effect on them as to what their attitude might be. On July 3, 1914, Garrett wrote Rice a personal letter telling about the interview with Mr. Dewing, saying that he should not ask him for money for premiums at this time, and telling Rice that Dewing and his associates controlled a large volume of business; that he stood to lose a large volume of business if Dewing got the worst of it; that if this fire was adjusted he, Rice, would be taken care of with business, and that he would be willing that they should deduct the amount of the premiums out of any settlements that might be made. On July 18, 1914, Rice wrote Garrett that *they had deducted the premium out of the general statement of premiums due by deducting the same from a draft received from the Anglo-American Reinsurance Company.* On August 4th, Rice wrote Garrett acknowledging letter written August 1st by Garrett to Rice, and returning two policies that were written May 1st. On August Garrett wrote Douglas Brothers & Rice, stating that it would be all right to cancel the policies written on May 1st.

After the loss by fire Douglas Brothers & Rice arranged for the adjustment of the loss, and secured the firm of Wagner & Glidden for this purpose, Glidden then proceeded to the adjustment and referred the matter to one Almond J. Hall. Hall visited the premises and on or about June 16, 1914, made his report to Wagner & Glidden. He testified that he was not supposed to adjust the loss, only to investigate. Mr. Glidden, thereafter having received the reports from Mr. Hall, took up the matter with Mr. Dewing, and testified that, *after he consulted with Mr. Rice, he was instructed to admit liability and accept proof of loss from the assured.* Proofs of loss were signed July 9, 1914, claiming a total loss of two thousand eight hundred fifty seven and 14/100 dollars. The proofs of loss were made out with the assured as John W. Prestel et al., and Mr. Dewing in the proofs made a sworn statement that no change had taken place in the title except that *the property was sold to the Michigan Idaho Lumber Company.* On July

13, 1914, Rice sent the proofs to the defendant company with the following letter:

"We beg to hand you herewith proof of loss under the above claim for \$2,857.14, together with adjuster's letter and bill amounting to \$27.93, all of which we trust you will find in order. We have also made up reinsurance proofs for the Equity & People's Fire Insurance Company, for their proportion of this loss, which we also inclose herewith, and if you will kindly complete and have them accompany your draft in payment of this claim, we will collect this proportion from the companies for you."

The adjuster's letter referred to was as follows:

"Inclosed herein find proofs of loss showing claim as adjusted in compromise amounting to approximately 57 per cent, terms of settlement being immediate payment without discount."

"The mill was entirely destroyed. The property was built by J. W. Prestel & Sons about 1903, it being a modern up to date plant at the time. The above people operated the plant up to 1913, at which time the same was purchased by the Michigan Idaho Lumber Company, who to some extent remodeled the mill, installing additional machinery so as to take care of a large amount of standing timber which the company had acquired from the government on the forest reserve.

The mill itself is located on an old slough which the company dam up to make a log pond. It seems that the filling up of the slough has been a menace to some of the agricultural land through which it flows, and there had been considerable agitation among the farmers regarding this overflow.

"You will note in proofs of loss that loss and damage was found to be *far in excess of insurance, and deduction has been made in compromise amounting to \$1,387.99.* This deduction was obtained from assured, due to the fact that they had failed to equip their night watchman with a watch clock, as provided in policy contract. *However, it must be borne in mind that there is also a clause in your form which states that any breach of warranty by the assured shall not vitiate policies unless it be shown that breach of warranty contributed to the loss.* Under the circumstances we feel quite pleased in being able to effect the compromise.

"The question of ownership was taken up by this office with your

agents, who were aware of the transfer of property, and had consented thereto, indorsement at the time of the loss not having been made.

"We suggest an immediate remittance to the assured, as we have previously explained *that compromise was a cash settlement.*"

On July 24th the defendant Northern Fire & Marine Insurance Company, answered as follows:

"Your letter of July 13th was just called to our attention to-day, and will say that I just got back from my vacation. We take pleasure in herewith handing you our check No. 631 for \$2,857.14 in payment of the loss sustained under our policy No. 33,847, and I am also sending you the proof of reinsurance under entry No. 186 of the People's Fire Insurance Company, and entry No. 51 of the Equity Fire Insurance Company, and will say I hope you will be able to collect the same and remit to us. I am also sending you our check No. 632 payable to Wagner & Glidden, adjusters' expense for \$27.93, and trust that the same will be satisfactory."

The following day, on July 25, the Northern Fire & Marine Insurance Company wired Rice to hold the draft and on the same date wrote Rice as follows:

"We wired you to hold draft payable to John W. Prestel et al., trustee, Payette, Idaho, in the matter of our loss under policy No. 33,847. I will say, Rice, that I have asked you to hold up this draft on account of some correspondence we have had with one of the companies who re-insured the risk with us, that is, the Equity Fire Insurance Company. Mr. C. McCutcheon said he was leaving that day for Chicago. He claims that this business was shut down and not running at the time of the loss. It was vacant, and will say there was nothing in our policy that permits this risk to become vacant. We do not want to be technical in the matter of payment of these losses, but we like to have our re-insurance company perfectly satisfied in the matter. I think, Mr. Rice, that you will understand our position in this matter, and if you can collect the reinsurance, I will say that we are willing to pay our part of it, providing the losses are on the square."

In reply to this letter and on July 29th, Rice wrote to the defendant company as follows:

"We are in receipt of your favor of the 27th instant, confirming your wire of the 25th instant asking that we hold your draft in payment of

above loss. We have complied with your wishes, and, inasmuch as Mr. Rice is at present out of the city, we have sent copy of your letter to him as he has had this entire matter in charge and understands all about same. Just as soon as we hear from Mr. Rice, will advise you. In the meantime we are holding your draft, together with reinsurance proofs and check payable to Wagner & Glidden, in this office, which we trust will meet with your approval."

In spite of these letters, however, and on August 3d, however, F. M. Rice wrote to Chas. H. Garrett as follows:

"We are inclosing herewith loss draft No. 631 of the Northern Fire & Marine Insurance Company for \$2,857.14, in payment of above loss, which we trust you will find in order."

And on the same day he wrote to the defendant, the Northern Fire & Marine Insurance Company, as follows:

"We have your favor of the 27th ultimo, which is a confirmation of your telegram of the 25th, regarding the hold-up of draft issued in settlement of this loss. We note that your reason for doing so is on account of advices that you have had from Mr. McCutcheon, secretary of the Equity Fire of Sioux City. We are very much surprised, and not a little provoked, at Mr. McCutcheon's action in this matter; for we went over the situation very carefully with him and explained to him just what the true situation was regarding the nature of this risk, and the amount of loss that was sustained by the assured, together with the standing and responsibility of the assured, and he led us to believe that there could be no objection made to the taking of the risk, or anything in connection with the loss that occurred. So that you may be fully advised regarding what the real situation is, we wish to say that Mr. C. A. Dewing, the president of the Michigan-Idaho Lumber Company, is a very prominent manufacturer of Kalamazoo, Michigan, a man of excellent financial responsibility and high standing, and a man who has been engaged in years gone by in the lumber business quite extensively in Michigan. Some time last year they had an opportunity to purchase the mill in question at Payette, which they did, in connection with the purchase of a large amount of standing timber from the United States government, located in the head waters of the Payette river. During the summer of 1913 they cut several million feet of logs, and got them into the water during the winter, and started them down stream early

this spring. In January of this year they took this mill, *which had been idle for several seasons*, and completely overhauled it, and invested several thousand dollars in getting the mill in proper shape so as to use it in the sawing of this timber they had purchased, they having purchased a sufficient amount to run them seven or eight years. *It is true, the mill was not in operation, but it had just been thoroughly overhauled, and was all ready to begin operations on the first of June* at which time the logs would be on hand to saw. They had a night watch, as you will see by the letter of Messrs. Wagner & Glidden, who made the adjustment, and there is no doubt but what the loss they sustained in excess of the insurance was equal to as much as they had insurance on the property. We were able to get a compromise settlement for the reason that while they had a watchman clause they had no watchman's clock, and by bearing down strongly on that point *we were able to get a concession of quite a little*. In other words, the loss was settled for \$10,000 when the probable loss figured out about \$12,000. *The matter was handled under the personal supervision of the writer*, and the Central National, who was interested on the loss for the same amount as your company, has already sent its draft in settlement, and we are to-day sending your draft, and will see that reinsurance proof is sent out, and we have no doubt but what the matter will be properly taken care of. The Central National retained \$2,500 on the risk, while your company only retained \$2,000. We of course regret very much the fact that a loss occurred, but, knowing all of the circumstances as we do now after the loss, we must say that if the risk came to us again with the same information we would accept it and issue our policies. The fact that the mill is burned and they have the lumber on hand now necessitates their building a new mill to take care of their lumber, which will probably mean an outlay of \$25,000 or \$30,000 in addition to the amount of insurance they are receiving. This in itself ought to indicate that the risk was a desirable one, and that there certainly was no moral hazard in connection therewith. If you do not hear promptly from the equity with their remittance for their proportion of the loss, kindly advise us, and we will endeavor to see that they give same prompt attention. We are writing you fully on the subject because we know that you are entitled to this information, and it is always our desire to furnish all the informa-

tion that properly goes with a risk so that our companies may be fully advised."

Later, and on August 10, 1914, the defendant insurance company wired F. M. Rice as follows:

"Our check payable to Idaho Michigan Lumber Company should have been payable to John W. Prestel, J. T. Crosby, J. C. Crosby, trustee, as their interest may appear. Should we not make new check so to read? Answer."

And Douglas Brothers & Rice replied:

"Your draft payable to Idaho Michigan Lumber Company is correct as issued. See our letter."

On August 11th, F. M. Rice wrote to the defendant insurance company as follows:

"Your day letter of August 10th stating that your check payable to Michigan Idaho Lumber Company should have been payable to John W. Prestel, J. T. Crosby, and J. C. Crosby, trustee, as their interests may appear, came duly to hand, in reply to which we wired you as follows:

"Your draft payable to Idaho Michigan Lumber Company is correct as issued, see our letter which message we now beg to confirm. Indorsements changing the ownership of this risk to the 'Michigan Idaho Lumber Company' *were duly received by us before the fire occurred, but our indorsement department did not get around to it so they were not reported to the companies.* If you will refer to the Adjuster's letter which accompanied the proofs, you will find *reference is made to these indorsements.* As stated in our telegram, your draft was correct as issued, and was sent to Kalamazoo for delivery to the assured."

On August 18, 1914, the Northern Fire & Marine Insurance Company wrote to F. M. Rice as follows:

"I am to notify you that in the case of Mr. Prestel, J. T. Crosby, and J. S. Crosby, as their interests may appear, assured under our policy No. 34,387, I will say that I have stopped the payment of this check that we sent you in payment of this loss. We see no reason why we should make the check payable to the Idaho-Michigan Lumber Company, when the policy reads to a different party. We also notice by the commercial report that these people turned it into the Idaho-Michigan Lumber Company, in 1913, consequently we see no reason why this was written in the name first mentioned therein."

On August 20, 1914, F. M. Rice wrote to the Northern Fire & Marine Insurance Company as follows:

"We have your favor of the 18th instant, and regret to note that you have not honored the draft you issued in payment of the above loss. We would respectfully refer you to our letter of the 11th instant, in which we explained to you *that the indorsements changing the ownership of this plant were received by us before the fire, but unfortunately our indorsement clerk did not get to them so as to properly report same to the companies promptly.* As stated to you previously, all the details regarding this loss were gone into thoroughly, and we trust that you will reconsider the matter and honor your draft as issued, especially as the Peoples draft in payment of its proportion was sent you yesterday, and has no doubt been received by you ere this."

On August 22, 1914, the defendant, the Northern Fire & Marine Insurance Company, wrote to F. M. Rice as follows:

"Your letter of August 20th at hand in regard to the loss under policy 33,847-Payett, Idaho. I will say, Mr. Rice, a week ago last Sunday I met Mr. Fred McCutcheon, of the Equity, and had quite a conversation with him in regard to the loss under the above policy. He called my attention to several things in regard to this matter, first; that this mill had not been in operation at least twelve months prior to the fire. Also there is a clause in the policy stating that if the mill was not in operation for thirty days that the policy would cease. Now, it has been pointed out to me that the mill was sold to the Idaho-Michigan Lbr. Company sometime in 1913. Our policy did not go into effect until the 4th day of March, 1914, and we do not understand why this policy was written to Prestel, Crosby, & Crosby, trustees, as their interest may appear when they had sold the mill sometime prior to the writing of the policy. Under the circumstances, we do not see why there should have been any indorsement as to the change of ownership on this policy, in fact, we do not see why it was written to them when the Idaho-Michigan Lbr. Company were the owners at the time the policy was written. Now, Mr. Rice, this office has been very negligent in the checks they have paid out for losses under policies written at your office. *We have left this entirely with you,* but under the circumstances above named you will see there is no reason why this loss should be paid. The Equity asks us for a stay in the payment of this loss until they make a thorough investigation

which is no more than right that we should do. It is true that we received the check from the Peoples Fire Insurance Company, but which has not been cashed, but simply filed in our office until future developments. We will hear Mr. McCutcheon's reply on this matter within the next ten days, and, if we find this matter to be all right, we will reissue our check to Prestel, Crosby, & Crosby."

H. A. Bronson, for appellant.

It is well settled that where an insurance policy is delivered to the applicant he is presumed to know its contents, and cannot evade a forfeiture for a violation of its terms on the ground that he never read it.

Smith v. Continental Ins. Co. 6 Dak. 433, 43 N. W. 810; *Hankins v. Rockford Ins. Co.* 70 Wis. 1, 35 N. W. 34; *Cleaver v. Traders' Ins. Co.* 65 Mich. 527, 8 Am. St. Rep. 908, 32 N. W. 660; *Leisen v. St. Paul F. & M. Ins. Co.* 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837.

Neither defendant nor its agent knew that the plaintiff was the owner of the property at the time the policy was issued. *Zimmerman v. Farmers' Ins. Co.* 76 Iowa, 354, 41 N. W. 39; *Collins v. St. Paul F. & M. Ins. Co.* 44 Minn. 440, 46 N. W. 906.

Fundamentally an action for reformation is necessary, and parol proof is not admissible in an action at law to show the facts and circumstances to vary the written instrument. 17 Cyc. 703; *Sargent v. Cooley*, 12 N. D. 1, 94 N. W. 576.

A waiver by an agent whose powers are restricted is ineffectual to bind the insurer except as to conditions relating to the inception of the contract where the agent had full knowledge thereof. 19 Cyc. 784; *Leisen v. St. Paul F. & M. Ins. Co.* 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837; *Wood v. American F. Ins. Co.* 149 N. Y. 382, 52 Am. St. Rep. 733, 44 N. E. 80.

No estoppel can arise through the collusion of the agent of the defendant with the assured, or could it so arise as to make the plaintiff the assured. 19 Cyc. 825; *Pomeroy v. Rocky Mountain Ins. Co.* — Colo. —, 7 Pac. 295.

Because the distinction between actions at law and suits in equity is abolished, it does not follow that *all* distinctions are abolished or destroyed, or that any change was made by reason thereof in the sub-
35 N. D.—17.

stantive law. Comp. Laws 1913, § 7355; *Black v. Minneapolis & N. Elevator Co.* 7 N. D. 133, 73 N. W. 90; *Hanson v. Carlblom*, 13 N. D. 361, 100 N. W. 1084.

Courts cannot lend their sanction to the recognition of a remedy at law, where the remedy at equity is ample. *Prondzinski v. Garbutt*, 8 N. D. 191, 77 N. W. 1012; *Niagara F. Ins. Co. v. Jordan*, 20 Ann. Cas. 363, note; *Thomson v. Southern Mut. Ins. Co.* 90 Ga. 78, 15 S. E. 652.

Whatever affects the rate of premium or influences the insurer in accepting or rejecting a risk is material. 2 Cooley, *Briefs on Ins.* pp. 1163, 1166.

There were concealment and misrepresentations in procuring the policy. Comp. Laws 1913, §§ 6480 to 6502, 6527.

It is fundamental concerning the doctrine of waiver or estoppel that either, to be effective against the party making it, must have occurred with the full knowledge of all the material facts. 19 Cyc. 778.

And, generally speaking, such questions are for the jury. 19 Cyc. 796, 798, 959; *Michigan Pipe Co. v. Michigan F. & M. Ins. Co.* 92 Mich. 482, 20 L.R.A. 277, 52 N. W. 1071.

Where the policy requires that any waiver of its provisions shall be in writing, signed by the president or indorsed on the policy, a parol waiver by the secretary will not avail. *Robb v. Millers Mut. F. Ins. Co.* 230 Pa. 44, 79 Atl. 150.

And the insured is presumed to contract with a knowledge of the limitations where they are contained in the policy. *Tilton v. Farmers' Ins. Co.* 82 Misc. 79, 143 N. Y. Supp. 107.

And such provisions in a policy are valid. *McCullough v. Home Ins. Co.* 155 Cal. 659, 102 Pac. 814, 18 Ann. Cas. 863; *McElroy v. Metropolitan L. Ins. Co.* 84 Neb. 866, 122 N. W. 27; *Leisen v. St. Paul F. & M. Ins. Co.* 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837; *Smith v. Continental Ins. Co.* 6 Dak. 433, 43 N. W. 810.

There can be no waiver of the conditions and terms of the policy, except by the company itself through its proper officer, and with full knowledge of all the material facts. *West End Hotel & Land Co. v. American F. Ins. Co.* 74 Fed. 114; *Ward v. Metropolitan L. Ins. Co.* 66 Conn. 240, 50 Am. St. Rep. 80, 33 Atl. 902; *Smith v. West Branch Mut. F. Ins. Co.* 31 Pa. Super. Ct. 29; *Texas Bkg. & Ins. Co. v.*

Hutchins, 53 Tex. 61, 37 Am. Rep. 750; Keith v. Royal Ins. Co. 117 Wis. 531, 94 N. W. 295.

Where the facts as to the existence of encumbrances are conceded to be material to the risk, a false answer or concealment is fatal to the policy, irrespective of the intent of the insured. 2 Cooley, Briefs on Ins. pp. 1394, 1399, 1407, 1410; 19 Cyc. 801; 13 Am. & Eng. Enc. Law, 238; Peet v. Dakota F. & M. Ins. Co. 7 S. D. 410, 64 N. W. 206; Weddington v. Piedmont F. Ins. Co. 141 N. C. 234, 54 S. E. 271, 8 Ann. Cas. 497; German-American Ins. Co. v. Humphrey, 62 Ark. 348, 54 Am. St. Rep. 297, 35 S. W. 428; May, Ins. 292; Hawkes v. Dodge County Mut. Ins. Co. 11 Wis. 189; Smith v. Niagara F. Ins. Co. 60 Vt. 692, 1 L.R.A. 216, 6 Am. St. Rep. 144, 15 Atl. 353; Merrill v. Agricultural Ins. Co. 73 N. Y. 452, 29 Am. Rep. 184; Imperial F. Ins. Co. v. Coös. County, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 379, 1 May, Ins. 175, 176; Insurance Co. of N. A. v. Wicker, 93 Tex. 390, 55 S. W. 740; East Texas F. Ins. Co. v. Kempner, 87 Tex. 229, 47 Am. St. Rep. 99, 27 S. W. 122; McKernan v. North River Ins. Co. 206 Fed. 984; Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133; Atlas Reduction Co. v. New Zealand Ins. Co. 9 L.R.A.(N.S.) 433, 71 C. C. A. 21, 138 Fed. 497; Mulrooney v. Royal Ins. Co. 90 C. C. A. 317, 163 Fed. 833; Gilchrist Transp. Co. v. Phoenix Ins. Co. 95 C. C. A. 475, 170 Fed. 279; Moore v. Phoenix Ins. Co. 62 N. H. 240, 13 Am. St. Rep. 556; Hunt v. Springfield F. & M. Ins. Co. 196 U. S. 47, 49 L. ed. 381, 25 Sup. Ct. Rep. 179; Thompson v. Phoenix Ins. Co. 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. Rep. 1019; McMaster v. New York L. Ins. Co. 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. Rep. 10; Shillaber v. Robinson, 97 U. S. 68-78, 24 L. ed. 967, 969; Charles v. Clagett, 3 Md. 82; Roper v. National F. Ins. Co. 161 N. C. 151, 76 S. E. 869; Black v. Atlantic Home Ins. Co. 148 N. C. 169, 21 L.R.A.(N.S.) 578, 61 S. E. 672; Shoucair v. North British & M. Ins. Co. 16 N. M. 563, 120 Pac. 328; Gray v. Guardian Assur. Co. 82 Hun, 380, 31 N. Y. Supp. 237; Jones & Pickett v. Michigan F. & M. Ins. Co. 132 La. 847, 61 So. 846.

Where the policy specifies certain acts as constituting an increase of hazard or risk so as to avoid the policy, and the facts are not in dispute, there is no question for the jury. 19 Cyc. 962, 769; 2 Cooley, Briefs on Ins. p. 1495.

Where there is a dispute, then what constitutes an increase of risk is essentially a question of fact. 2 Cooley, Briefs on Ins. p. 1495; Lebanon County v. Franklin F. Ins. Co. 237 Pa. 360, 44 L.R.A.(N.S.) 148, 85 Atl. 419, Ann. Cas. 1914B, 130; Girard F. & M. Ins. Co. v. Stephenson, 37 Pa. 293, 78 Am. Dec. 423; Martin v. Capital Ins. Co. 85 Iowa, 650, 52 N. W. 534; Collins v. Merchants' & B. Mut. Ins. Co. 95 Iowa, 540, 58 Am. St. Rep. 438, 64 N. W. 602; Pool v. Milwaukee Mechanics Ins. Co. 91 Wis. 530, 51 Am. St. Rep. 920, 65 N. W. 54; Kircher v. Milwaukee Mechanics' Mut. Ins. Co. 74 Wis. 470, 5 L.R.A. 779, 43 N. W. 487; Taylor v. Security Mut. F. Ins. Co. 88 Minn. 231, 92 N. W. 952; Orient Ins. Co. v. McKnight, 197 Ill. 190, 64 N. E. 339.

An insurance company may limit the powers of its agents. It was here done in clear and plain terms contained in the policy, and when plaintiff accepted the policy, it became the contract between the parties, and plaintiff was charged with a knowledge of all its terms. Sharman v. Continental Ins. Co. 167 Cal. 117, 52 L.R.A.(N.S.) 670, 138 Pac. 709.

Admissions and acts of agents, or notice received by them when acting in collusion with the third person, will not only create an estoppel as a matter of law, but likewise is not binding upon the principal either as a waiver, an admission, or even notice. 31 Cyc. 1573, 1596; 19 Cyc. 825.

Such provisions in a policy as are here mentioned are valid enforceable stipulations. They are a part of a lawful contract. 19 Cyc. 855.

If the assured has sworn wilfully to false statements in his proof of loss, as to his title or ownership, the policy will be avoided. Alfred Hiller Co. v. Insurance Co. of N. A. 125 La. 938, 32 L.R.A.(N.S.) 453, 52 So. 104, and cases cited.

The burden was upon plaintiff to establish the value of the property destroyed. This was not an affirmative defense for defendant to prove. 19 Cyc. 939, 946; McSparran v. Southern Mut. Ins. Co. 193 Pa. 184, 44 Atl. 317; Livings v. Home Mut. F. Ins. Co. 50 Mich. 207, 15 N. W. 85.

In order to establish a waiver, it must appear that the insurer had notice or full knowledge of the facts avoiding or forfeiting the insurance.

3 Cooley, Briefs on Ins. 2467, 2469, 2737; Ennis v. Retail Merchants Asso. Mut. F. Ins. Co. 33 N. D. 20, 156 N. W. 234; Pool v. Mil-

waukee Mechanics' Ins. Co. 91 Wis. 530, 51 Am. St. Rep. 920, 65 N. W. 54; McCormick v. Oriental Ins. Co. 86 Cal. 260, 24 Pac. 1003; Freedman v. Providence Washington Ins. Co. 175 Pa. 350, 34 Atl. 730.

Murphy & Toner, for respondent.

In general, where defendant relies on breach of warranties or conditions, it must allege the warranty or condition relied on as having been violated and the specific facts constituting such violation, and he must bring his case clearly within the conditions or warranties relied upon. Cassimus Bros. v. Scottish Union & Nat. Ins. Co. 135 Ala. 256, 33 So. 163; Phoenix Ins. Co. v. Barnd, 16 Neb. 89, 20 N. W. 105; Bittinger v. Providence Washington Ins. Co. 24 Fed. 549; Schaetzel v. Germantown Farmers' Mut. Ins. Co. 22 Wis. 412; Tischler v. California Farmers' Mut. F. Ins. Co. 66 Cal. 178, 4 Pac. 1169; British America Assur. Co. v. Cooper, 6 Colo. App. 25, 40 Pac. 148; Montgomery v. Delaware Ins. Co. 67 S. C. 399, 45 S. E. 934; Smith v. Home Ins. Co. 47 Hun, 30; Baumiller v. Workingman's Co-op. Asso. 9 Misc. 157, 29 N. Y. Supp. 26; Farmers & M. Ins. Co. v. Wiard, 59 Neb. 451, 81 N. W. 312; Farmers & M. Ins. Co. v. Newman, 58 Neb. 504, 78 N. W. 933; Caplis v. American F. Ins. Co. 60 Minn. 376, 51 Am. St. Rep. 535, 62 N. W. 440; Cronin v. Fire Asso. of Philadelphia, 112 Mich. 106, 70 N. W. 448; Smith v. Champion, 102 Ga. 92, 29 S. E. 160; Pino v. Merchants' Mut. Ins. Co. 19 La. Ann. 214, 92 Am. Dec. 529; Helvetia Swiss F. Ins. Co. v. Edward P. Allis Co. 11 Colo. App. 264, 53 Pac. 242.

Defendant must specifically plead other insurance (Smith v. Home Ins. Co. 47 Hun, 30; Phoenix Mut. F. Ins. Co. v. Bowersox, 6 Ohio C. C. 1, 3 Ohio C. D. 321; Petty v. Mutual F. Ins. Co. 111 Iowa, 358, 82 N. W. 767; Sling v. National Assur. Co. 7 Utah, 441, 27 Pac. 170; German Ins. Co. v. Cain, — Tex. Civ. App. —, 37 S. W. 657); or failure to arbitrate (Deavenport v. Phoenix Assur. Co. 16 Tex. Civ. App. 283, 41 S. W. 399; Caston v. Monmouth M. F. Ins. Co. 54 Me. 170; Fox v. Conway F. Ins. Co. 53 Me. 107; McManus v. Western Assur. Co. 22 Misc. 269, 48 N. Y. Supp. 820); or violation of warranty as to title and ownership (Sprigg v. American Cent. Ins. Co. 101 Ky. 185, 40 S. W. 575); (Queen Ins. Co. v. Leonard, 6 Ohio C. D. 49; American Cent. Ins. Co. v. Murphy, — Tex. Civ. App. —, 61 S. W.

956; *Temple v. Western Assur. Co.* 35 N. B. 171; *Sussex County Mut. Ins. Co. v. Woodruff*, 26 N. J. L. 541; or misrepresentations as to condition of the property insured (*Mulry v. Mohawk Valley Ins. Co.* 5 Gray, 541, 66 Am. Dec. 380; *Haskins v. Hamilton Mut. Ins. Co.* 5 Gray, 432); or as to increase of hazard (*Newman v. Springfield F. & M. Ins. Co.* 17 Minn. 123, Gil. 98; *Pierce v. Cohasset Mut. F. Ins. Co.* 123 Mass. 572; *New York v. Brooklyn F. Ins. Co.* 3 Abb. App. Dec. 251; *Phoenix Ins. Co. v. Caldwell*, 187 Ill. 73, 58 N. E. 314).

Allegations of fraud or false swearing, without stating the specific facts, are not sufficient. *Phoenix Ins. Co. v. McAtee*, 33 Ind. Terr. 106, 70 N. E. 947.

Defense that plaintiff wilfully burned the property cannot be made under a general denial, even where plaintiff alleges loss was caused without his fault. *Corkery v. Security F. Ins. Co.* 99 Iowa, 382, 68 N. W. 792.

In the absence of a counterclaim, under our practice where no reply is necessary, waiver and estoppel may be proved without being alleged. *Parno v. Iowa Merchants Mut. Ins. Co.* 114 Iowa, 132, 86 N. W. 210; *Crittenden v. Springfield F. & M. Ins. Co.* 85 Iowa, 652, 39 Am. St. Rep. 321, 52 N. W. 548; *Norris v. Hartford F. Ins. Co.* 57 S. C. 358, 35 S. E. 572; *Kingman v. Lancashire Ins. Co.* 54 S. C. 599, 32 S. E. 762; *Gans v. St. Paul F. & M. Ins. Co.* 43 Wis. 108, 28 Am. Rep. 535; *Kephart v. Continental Casualty Co.* 17 N. D. 383, 116 N. W. 349; *National German American Bank v. Lang*, 2 N. D. 66, 49 N. W. 414; *Sandmeyer v. Dakota F. & M. Ins. Co.* 2 S. D. 346, 50 N. W. 353; *Morris v. Hubbard*, 10 S. D. 259, 72 N. W. 694; *Houghton Implement Co. v. Vavrowski*, 19 N. D. 594, 125 N. W. 1024; *Buchanan v. Randall*, 21 S. D. 44, 109 N. W. 513.

The receipt of a letter by the insured, hinting that the property would be purposely burned, the contents of which insured did not communicate to the insurance company, was held not to avoid the policy or increase the risk. *Hartford F. Ins. Co. v. Dorroh*, — Tex. Civ. App. —, 133 S. W. 465.

Such terms and conditions in a policy of insurance refer to hazards resulting from physical changes. *Williamsburg City F. Ins. Co. v. Weeks Drug Co.* — Tex. Civ. App. —, 133 S. W. 1097; *Albion Lead Works v. Williamsburg City F. Ins. Co.* 2 Fed. 486; *State Ins. Co. v.*

Taylor, 14 Colo. 509, 20 Am. St. Rep. 281, 24 Pac. 333; Angier v. Western Assur. Co. 10 S. D. 87, 66 Am. St. Rep. 685, 71 N. W. 761; Loud v. Citizens Mut. Ins. Co. 2 Gray, 221.

Here failure or neglect to make known, without inquiry, facts which the insurer may regard as material, is not concealment within the meaning of the policy. Arthur v. Palatine Ins. Co. 35 Or. 27, 76 Am. St. Rep. 450, 57 Pac. 62; Orient Ins. Co. v. Peiser, 91 Ill. App. 278; Cleavenger v. Franklin F. Ins. Co. 47 W. Va. 595, 35 S. E. 998; 2 Clement, Fire Ins. 142; Wolpert v. Northern Assur. Co. 44 W. Va. 734, 29 S. E. 1024; Morotock Ins. Co. v. Rodefer Bros. 92 Va. 747, 53 Am. St. Rep. 848, 24 S. E. 393; Georgia Home Ins. Co. v. Holmes, 75 Miss. 390, 65 Am. St. Rep. 611, 23 So. 183.

Occupied means used for human habitation. Vacant means both the absence of occupancy by human beings and that the contents of the building have been removed. Bellevue Roller Mill Co. v. London & L. F. Ins. Co. 4 Idaho, 307, 39 Pac. 196; 13 Am. & Eng. Enc. Law, 280, 281.

Whether in writing or oral, the statements made by Rice to Hand, if made, were self-serving declarations made of a past transaction by an agent to his principal, or by one general agent to another general agent without the knowledge or participation of the defendant. Mulroy v. Jacobson, 24 N. D. 354, 139 N. W. 697; Huston v. Johnson, 29 N. D. 555, 151 N. W. 774.

The thirty-day clause relating to idleness had no application if the mill was idle when the policy was issued. The questions of waiver and estoppel also apply to this issue. At the time of the fire and during the entire evening before the fire, the watchman was on duty patrolling the premises. Hence the absence of the watchman's clock did not contribute to the loss. 13 Am. & Eng. Enc. Law, 284; Hanover F. Ins. Co. v. Gustin, 40 Neb. 828, 59 N. W. 375; King Brick Mfg. Co. v. Phoenix Ins. Co. 164 Mass. 291, 41 N. E. 277; Burlington F. Ins. Co. v. Coffman, 13 Tex. Civ. App. 439, 35 S. W. 406; Phoenix Assur. Co. v. Coffman, 10 Tex. Civ. App. 631, 32 S. W. 810; Kansas Mill Owners & Mfrs. Mut. F. Ins. Co. v. Metcalf, 59 Kan. 383, 53 Pac. 68; London & L. Ins. Co. v. Gerteisen, 106 Ky. 815, 51 S. W. 617; McGannon v. Michigan Millers' Mut. F. Ins. Co. 127 Mich. 636, 54 L.R.A. 739, 89 Am. St. Rep. 501, 87 N. W. 61; Au Sable Lumber Co. v. Detroit

Mfrs. Mut. F. Ins. Co. 89 Mich. 407, 50 N. W. 870; McGannon v. Millers' Nat. Ins. Co. 171 Mo. 143, 94 Am. St. Rep. 778, 71 S. W. 160.

The allegation as to increase of hazard as it is made in the answer is a mere conclusion. The pleader does not state how or why it was increased. The specific facts claimed to constitute the increased hazard must be pleaded. Peirce v. Cohasset Mut. F. Ins. Co. 123 Mass. 572; New York v. Brooklyn F. Ins. Co. 3 Abb. App. Dec. 251; Newman v. Springfield F. & M. Ins. Co. 17 Minn. 123, Gil. 98.

The insured did not agree to keep buckets and barrels of water on the premises in anticipation of a fire. No such requirement is found in the policy. Jones v. Hatchett, 14 Ala. 743.

A mortgage or trust deed does not violate the policy. 19 Cyc. 694.

A subagent of the general agent adjusted the loss and prepared in writing the proofs of loss. At that time the appellant knew all about how plaintiff became the owner of the property. Under these circumstances it is held that false statements in the proofs of loss are not binding on the assured. Cook v. Lion F. Ins. Co. 67 Cal. 368, 7 Pac. 784; Crittenden v. Springfield F. & M. Ins. Co. 85 Iowa, 652, 39 Am. St. Rep. 321, 52 N. W. 548; Castner v. Farmers' Mut. F. Ins. Co. 50 Mich. 273, 15 N. W. 452; Star Union Lumber Co. v. Finney, 35 Neb. 214, 52 N. W. 1113.

The principle governing all cases is the same, namely, that where a state of facts should not exist and do, and at the time of the issuance of the policy the agent of the insurance company knew this, the provisions of the policy are waived. Leisen v. St. Paul F. & M. Ins. Co. 20 N. D. 315, 30 L.R.A.(N.S.) 539, 127 N. W. 837; Bellevue Roller Mill Co. v. London & L. F. Ins. Co. 4 Idaho, 307, 39 Pac. 196; Williams v. North German Ins. Co. 24 Fed. 625; Born v. Home Ins. Co. 120 Iowa, 299, 94 N. W. 849; Phoenix Ins. Co. v. Angel, 18 Ky. L. Rep. 1034, 38 S. W. 1067; Haire v. Ohio Farmers' Ins. Co. 93 Mich. 481, 53 N. W. 623; Wilson v. Minnesota Farmers' Mut. F. Ins. Co. 36 Minn. 112, 1 Am. St. Rep. 659, 30 N. W. 401; Farmers & M. Ins. Co. v. Wiard, 59 Neb. 451, 81 N. W. 312; German Ins. Co. v. Everett, — Tex. Civ. App. —, 36 S. W. 125; Continental Ins. Co. v. Cummings, 98 Tex. 115, 81 S. W. 705; Welch v. Fire Asso. of Philadelphia, 120 Wis. 456, 98 N. W. 227; Henderson v. Standard F. Ins. Co. 143 Iowa,

572, 121 N. W. 714; German Ins. Co. v. York, 48 Kan. 488, 30 Am. St. Rep. 313, 29 Pac. 586; German-American Ins. Co. v. Yeagley, 2 Ann. Cas. 282, note; Sharp v. Scottish Union & Nat. Ins. Co. 136 Cal. 542, 69 Pac. 253, 615; Allen v. Phoenix Assur. Co. 14 Idaho, 728, 95 Pac. 829; Hulen v. National F. Ins. Co. 80 Kan. 127, 102 Pac. 52; Queen Ins. Co. v. Straughan, 70 Kan. 186, 109 Am. St. Rep. 421, 78 Pac. 447; Arkansas Ins. Co. v. Cox, 21 Okla. 873, 20 L.R.A.(N.S.) 775, 129 Am. St. Rep. 808, 98 Pac. 552; Hartford F. Ins. Co. v. Redding, 47 Fla. 228, 37 So. 62; Clay v. Phoenix Ins. Co. 97 Ga. 44, 25 S. E. 417; City F. Ins. Co. v. Carrugi, 41 Ga. 660; Lycoming Ins. Co. v. Barringer, 73 Ill. 230; Reaper Ins. Co. v. Jones, 62 Ill. 458; Lamb v. Council Bluffs Ins. Co. 70 Iowa, 238, 30 N. W. 497; Rhode Island Underwriters' Asso. v. Monarch, 98 Ky. 305, 32 S. W. 959; Emery v. Piscataqua F. & M. Ins. Co. 52 Me. 322; National F. Ins. Co. v. Crane, 16 Md. 260, 77 Am. Dec. 289; Copeland v. Dwelling-house Ins. Co. 77 Mich. 554, 43 N. W. 991; Broadwater v. Lion F. Ins. Co. 34 Minn. 465, 26 N. W. 455; Horwitz v. Equitable Mut. Ins. Co. 40 Mo. 557, 93 Am. Dec. 321; Hadley v. New Hampshire F. Ins. Co. 55 N. H. 110; Carpenter v. German American Ins. Co. 135 N. Y. 298, 31 N. E. 1015; Berry v. American Cent. Ins. Co. 132 N. Y. 49, 28 Am. St. Rep. 548, 30 N. E. 254; Brothers v. California Ins. Co. 121 N. Y. 659, 24 N. E. 1092; Cowell v. Phoenix Ins. Co. 126 N. C. 684, 36 S. E. 184; Melvin v. Insurance Co. of N. A. 2 Luzerne Leg. Reg. 219; Swartz v. Insurance Co. 15 Phila. 206; American Cent. Ins. Co. v. McCrea, 8 Lea. 513, 41 Am. Dec. 647; Planters' Mut. Ins. Co. v. Lyons, 38 Tex. 253; Aetna Ins. Co. v. Eastman, — Tex. Civ. App. —, 80 S. W. 255; Hibernia Ins. Co. v. Malevinsky, 6 Tex. Civ. App. 81, 24 S. W. 804; West v. Norwich Union F. Ins. Soc. 10 Utah, 442, 37 Pac. 685; Mutual F. Ins. Co. v. Ward, 95 Va. 231, 28 S. E. 209; Henchel v. Oregon F. & M. Ins. Co. 4 Wash. 476, 30 Pac. 736, 31 Pac. 332, 765; Schultz v. Caledonia Ins. Co. 94 Wis. 42, 68 N. W. 414; Dupuy v. Delaware Ins. Co. 63 Fed. 680; Diebold v. Phoenix Ins. Co. 33 Fed. 807; Hunt v. Mercantile Ins. Co. 22 Fed. 503; 28 Century Dig. § 1016; Mentz v. Lancaster F. Ins. Co. 79 Pa. 475; Rathbone v. City F. Ins. Co. 31 Conn. 193; Moffitt v. Phoenix Ins. Co. 11 Ind. App. 233, 38 N. E. 835.

The persons with whom the assured here dealt were the local, general

agents, who in the absence of some restriction of authority, brought home to the assured, the respondent, were, as to him, the appellant itself. *Maryland F. Ins. Co. v. Gusdorf*, 43 Md. 506; *Henchel v. Western Assur. Co.* 4 Wash. 816, 30 Pac. 735; *West v. Norwich Union F. Ins. Soc.* 10 Utah, 442, 37 Pac. 685.

Appellant tries to avoid the payment of the loss here, because its consent to other insurance was not indorsed on the policy. *Copeland v. Dwelling-house Ins. Co.* 77 Mich. 554, 43 N. W. 992; *Kausal v. Minnesota Farmers' Mut. F. Ins. Asso.* 31 Minn. 17, 47 Am. Rep. 776, 16 N. W. 431; *Brandup v. St. Paul F. & M. Ins. Co.* 27 Minn. 393, 7 N. W. 735, 63 Fed. 680, *supra*.

The silence of the company is held to be an implied waiver, and its silence leading the assured to believe he is protected, estops it to question liability. *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689; *Rauch v. Michigan Millers' Mut. F. Ins. Co.* 131 Mich. 281, 91 N. W. 160; *Phoenix Ins. Co. v. Johnson*, 143 Ill. 106, 32 N. E. 429; *Orient Ins. Co. v. McKnight*, 197 Ill. 190, 64 N. E. 339; *Farmers Mut. F. Ins. Co. v. Schaeffer*, 82 Md. 377, 33 Atl. 728; *Swedish American Ins. Co. v. Knutson*, 67 Kan. 71, 100 Am. St. Rep. 382, 72 Pac. 526; *Westlake v. St. Lawrence County Mut. Ins. Co.* 14 Barb. 206; *Home F. Ins. Co. v. Kuhlman*, 58 Neb. 488, 78 N. W. 936.

Where it is claimed that a policy has been canceled, or superseded by another contract, it must be so pleaded, or the company will be estopped and will be deemed to have waived it. *Denney v. Stoud*, 59 Neb. 731, 82 N. W. 18; *Kerstetter v. Raymond*, 10 Ind. 199; *Billingsley v. Stratton*, 11 Ind. 396; *Law v. Plume*, 17 N. J. L. 466; *Pike v. Mott*, 5 Vt. 108.

Reformation of a policy and recovery thereunder may be had in the same suit. *Deitz v. Providence Washington Ins. Co.* 31 W. Va. 851, 13 Am. St. Rep. 909, 8 S. E. 616; *Burke v. Niagara F. Ins. Co.* 34 N. Y. S. R. 701, 12 N. Y. Supp. 254, 128 N. Y. 668, 29 N. E. 148; *Eggleston v. Council Bluffs Ins. Co.* 65 Iowa, 308, 21 N. W. 652; *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 533; *State Ins. Co. v. Schreck*, 27 Neb. 527, 6 L.R.A. 524, 20 Am. St. Rep. 696, 43 N. W. 340; *Carey v. Home Ins. Co.* 97 Iowa, 619, 66 N. W. 920; *Kansas Farmers F. Ins. Co. v. Saindon*, 52 Kan. 486, 39 Am. St. Rep. 356, 35 Pac. 15; *Hobkirk v. Phoenix Ins. Co.* 102 Wis. 13, 78 N. W. 160;

Smith v. Commonwealth Ins. Co. 49 Wis. 322, 5 N. W. 804; German Ins. Co. v. Davis, 6 Kan. App. 268, 51 Pac. 60; Maryland Home F. Ins. Co. v. Kimmell, 89 Md. 437, 43 Atl. 764; Ben Franklin Ins. Co. v. Gillett, 54 Md. 212; Maher v. Hibernia Ins. Co. 67 N. Y. 292; Hammel v. London Queen Ins. Co. 50 Wis. 240, 6 N. W. 805.

The agent Rice was permitted to modify policies. Hence we urge that no reformation of the policy was necessary as this policy had been modified by mutual agreement of the parties, so that plaintiff was the assured. Washington F. Ins. Co. v. Davidson, 30 Md. 91; Solms v. Rutgers F. Ins. Co. 4 Abb. App. Dec. 279; McLean v. American Mut. F. Ins. Co. 122 Iowa, 355, 98 N. W. 146; Montgomery v. American Cent. Ins. Co. 108 Wis. 146, 84 N. W. 175; Westchester F. Ins. Co. v. Earle, 33 Mich. 143.

It is incumbent on defendant to plead encumbrances. Danvers Mut. F. Ins. Co. v. Schertz, 95 Ill. App. 656; Home Ins. Co. v. Gaddis, 3 Ky. L. Rep. 159; Farmers & M. Ins. Co. v. Newman, 58 Neb. 504, 78 N. W. 933; Light v. Greenwich Ins. Co. 105 Tenn. 480, 58 S. W. 851; Arthur v. Palatine Ins. Co. 35 Or. 27, 57 Pac. 62; Liverpool & L. & G. Ins. Co. v. Ricker, 10 Tex. Civ. App. 264, 31 S. W. 248; Quarrier v. Peabody Ins. Co. 10 W. Va. 507, 27 Am. Rep. 582; O'Brien v. Ohio Ins. Co. 52 Mich. 131, 17 N. W. 726; City F. Ins. Co. v. Car-rugi, 41 Ga. 660; Morotock Ins. Co. v. Rodefer Bros. 92 Va. 747, 53 Am. St. Rep. 848, 24 S. E. 393; Boulware v. Farmers' & L. Co-op. Ins. Co. 77 Mo. App. 639; Seal v. Farmers & M. Ins. Co. 59 Neb. 253, 80 N. W. 807; Slobodisky v. Phenix Ins. Co. 53 Neb. 816, 74 N. W. 270; Insurance Co. of N. A. v. Bachler, 44 Neb. 549, 62 N. W. 911.

A mortgage under which there is nothing due is not an encumbrance. Laird v. Littlefield, 164 N. Y. 597, 58 N. E. 1089; Merrill v. Agricultural Ins. Co. 73 N. Y. 452, 29 Am. Rep. 184; Smith v. Niagara F. Ins. Co. 60 Vt. 682, 1 L.R.A. 216, 6 Am. St. Rep. 144, 15 Atl. 353; Hawkes v. Dodge County Mut. Ins. Co. 11 Wis. 188; Continental Ins. Co. v. Vanlue, 126 Ind. 410, 10 L.R.A. 843, 26 N. E. 119; Lang v. Hawkeye Ins. Co. 74 Iowa, 673, 39 N. W. 86; Dougherty v. German-American Ins. Co. 67 Mo. App. 526; Brennen v. Connecticut F. Ins. Co. 99 Mo. App. 718, 74 S. W. 406; Mutual Mill Ins. Co. v. Gordon, 121 Ill. 366, 12 N. E. 747; Ring v. Windsor County Mut. Ins. Co. 54 Vt. 434.

Where the facts are not in dispute, the question of increase of hazard is for the court. 19 Cyc. 962.

On the proof of loss and adjustment thereof, and with full knowledge of all the facts, the appellant agreed to pay the amount of the adjusted loss. *West Coast Lumber Co. v. State Invest. & Ins. Co.* 98 Cal. 502, 33 Pac. 258; *Silverburg v. Phenix Ins. Co.* 67 Cal. 36, 7 Pac. 38; *Murray v. Home Benefit Life Asso.* 90 Cal. 402, 25 Am. St. Rep. 133, 27 Pac. 309; *Wheaton v. North British & M. Ins. Co.* 76 Cal. 415, 18 Pac. 758; *Stache v. St. Paul F. & M. Ins. Co.* 49 Wis. 89, 35 Am. St. Rep. 772, 5 N. W. 36; *Smith v. Glen's Falls Ins. Co.* 62 N. Y. 85.

The general agent of the company had the right to waive provisions of the policy, notwithstanding the fact that the policy provides that no officer, agent, or representative of the company shall have authority to waive or change the same. *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689; *Breeden v. Aetna F Ins. Co.* 23 S. D. 417, 122 N. W. 348; *Reed v. Continental Ins. Co.* 6 Penn. (Del.) 204, 65 Atl. 569; *Indian River State Bank v. Hartford F. Ins. Co.* 46 Fla. 283, 35 So. 228; *Vogle v. Ohio Farmers' Ins. Co.* 166 Ind. 239, 3 L.R.A.(N.S.) 966, 76 N. E. 977; *Peters v. Plano Mfg. Co.* 21 S. D. 198, 110 N. W. 783; *Schomer v. Hekla F. Ins. Co.* 50 Wis. 575, 7 N. W. 544; *Mattocks v. Des Moines Ins. Co.* 74 Iowa, 233, 37 N. W. 174; *American Ins. Co. v. Gallatin*, 48 Wis. 36, 3 N. W. 772; *Continental F. Ins. Co. v. Brooks*, 131 Ala. 614, 30 So. 876; *German Ins. Co. v. Amsbaugh*, 8 Kan. App. 197, 55 Pac. 481; *Kotwicki v. Thuringia Ins. Co.* 134 Mich. 82, 95 N. W. 976; *Thompson v. Traders' Ins. Co.* 169 Mo. 12, 68 S. W. 889; *Dick v. Merchants' Ins. Co.* 92 Wis. 46, 65 N. W. 742.

Notice to the agent of the company prior to or at the time of the issuance of the policy, when acting about his agency, is notice to the company. 19 Cyc. 789, 807-809; *West v. Norwich Union F. Ins. Co.* 10 Utah, 442, 37 Pac. 685.

Where the general agent of the company, during the running of the policy, writes letters assuming the validity of the insurance, his acts are binding on the company, and raise a waiver as against the company. 19 Cyc. 819 (b).

Appellant knew respondent was the owner of the property long before the fire, and demanded and insisted on the premium being paid, and received and retained such premium, and received and detained

the proofs of loss. Do these acts constitute waiver? 19 Cyc. 789, 794, 797-873; *Johnson v. Dakota F. & M. Ins. Co.* 1 N. D. 167, 45 N. W. 799; *Hartford F. Ins. Co. v. Orr*, 56 Ill. App. 629; *Phenix Ins. Co. v. Covey*, 41 Neb. 724, 60 N. W. 12; *Miner v. Phoenix Ins. Co.* 27 Wis. 693, 9 Am. Rep. 479.

The subagent extended the time in which to make proofs of loss. He had the power to do so. 19 Cyc. 848(d) 859(e); *Hitchcock v. State Ins. Co.* 10 S. D. 27, 72 N. W. 898; *Capital City Ins. Co. v. Caldwell Bros.* 95 Ala. 77, 10 So. 355; *Mickey v. Burlington Ins. Co.* 35 Iowa, 174, 14 Am. Rep. 494; *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241; *Minneapolis, St. P. & S. Ste. M. R. Co. v. Home Ins. Co.* 64 Minn. 61, 66 N. W. 132; *Commercial Union Assur. Co. v. Hocking*, 115 Pa. 407, 2 Am. St. Rep. 562, 8 Atl. 589; *Rheims v. Standard F. Ins. Co.* 39 W. Va. 672, 20 S. E. 670.

But there was a settlement, adjustment of the loss, and a promise to pay. *Pennsylvania F. Ins. Co. v. Hughes*, 47 C. C. A. 459, 108 Fed. 497; *Phenix Ins. Co. v. Taylor*, 5 Minn. 492, Gil. 393; *German Ins. Co. v. Allen*, 69 Kan. 729, 77 Pac. 529; *British America Assur. Co. v. Bradford*, 60 Kan. 82, 55 Pac. 335; *Glasscock v. Des Moines Ins. Co.* 125 Iowa, 170, 100 N. W. 503; *Tillis v. Liverpool & L. & G. Ins. Co.* 46 Fla. 268, 110 Am. St. Rep. 89, 35 So. 171; *German F. Ins. Co. v. Carrow*, 21 Ill. App. 631; *Farmers' Mut. Relief Asso. v. Koontz*, 4 Ind. App. 538, 30 N. E. 145; *Eddy v. Merchants' M. & C. Mut. F. Ins. Co.* 72 Mich. 651, 40 N. W. 775; *Farmers' Mut. F. Ins. Co. v. Gargett*, 42 Mich. 289, 3 N. W. 954; *Wagner v. Dwelling-House Ins. Co.* 143 Pa. 338, 22 Atl. 885; *Gibbs v. Dutchess County Mut. Ins. Co.* 50 N. Y. S. R. 35, 21 N. Y. Supp. 203; *Eagan v. Aetna F. & M. Ins. Co.* 10 W. Va. 583; *Oshkosh Gaslight Co. v. Germania F. Ins. Co.* 71 Wis. 454, 5 Am. St. Rep. 233, 37 N. W. 819; *Concordia F. Ins. Co. v. Koretz*, 14 Colo. App. 386, 60 Pac. 191.

BRUCE, J. (after stating the facts as above). The plaintiff maintains that the action is primarily brought upon the draft and upon the contract of settlement and adjustment which it represented rather than upon the insurance policy, and that what is said in the complaint in regard to the insurance policy is merely surplusage, or at the most merely relates to the consideration.

In this contention we believe that the plaintiff is correct, and that the action is based upon the allegation of the complaint which alleges "that on or about the 28th day of April, 1914, the loss under the policy hereinbefore described was compromised and adjusted between the plaintiff and defendant on the basis of the sum of \$10,000, and the amount agreed upon at said time as being due and payable from the defendant to the plaintiff under the policy aforesaid was the sum of (\$2,857.14) two thousand eight hundred and fifty-seven and 14/100 dollars, which amount defendant promised and agreed to pay to the plaintiff, and thereafter for the purpose of paying the loss so agreed upon the draft hereinbefore described was given."

Although, therefore, the record in this case is quite voluminous and numerous matters are discussed in the briefs of counsel, the question at issue is a comparatively simple one, and, unless we can say that there was evidence which should have been submitted to the jury which tended to show that the settlement with the adjuster and the subsequent issuance of the draft in question were brought about by the fraud of the plaintiff or were the result of a mistake of fact such as would furnish a ground for a rescission of the contract, the verdict was properly directed, and we have no option but to affirm the judgment. *Ostrander, Fire Ins. § 372; Godchaux v. Merchants' Mut. Ins. Co. 34 La. Ann. 235; Phoenix Ins. Co. v. Van Allen, 29 Ill. App. 149.*

There can be no question that the adjuster had authority to adjust the loss, and that he compromised and settled it, and agreed on behalf of the defendant company to pay the amount sued upon. There can be no question that the settlement was approved by the company, that a draft was sent to their general agents, Douglas & Rice, in payment thereof, and with directions to deliver to the plaintiff. There can be no question as to the general agency of Douglas & Rice, and there can be no contention that the plaintiffs, at the time of the delivery of the draft, and their acceptance of it, and of the settlement of the controversy out of which it arose, and in payment of which it was given, had any knowledge that the authority of the agents to deliver the same had in any manner been withdrawn.

We have a case, therefore, where the general agents of an insurance company, who have throughout been intrusted by that company with the almost unlimited control of their business, are given a draft with which

to pay for a settlement which they have made under the authority of that company, and where, though before such delivery they are told to hold up the draft, they deliver it without any knowledge on the part of the payee of the secret instructions which they have received.

It is well established that a general agent of an insurance company who has had given to him a draft payable to an insurer has implied authority to deliver the same.

It is also well established that "what third persons are interested in is not the secret processes of the principal's mind, but the visible result of those processes—the character in which the agent is held out by the principal to those who may have occasion or opportunity to deal with him. This character is a tangible, discernible thing, and, so far as third persons are concerned, must be held to be authorized, as it is the only expression and evidence from which the principal intends that they shall determine his purposes and objects. . . . Instructions or limitations which are not disclosed cannot be permitted to affect apparent powers. . . . Although the agent violates his instructions or exceeds the limits set to his authority, he will yet bind his principal to such third persons, if his acts are within the scope of the authority, which the principal has caused or permitted him to appear to possess." *Mechem, Agency*, §§ 278, 279; *Taylor v. Craig*, 2 J. J. Marsh. 449; *Dixon v. Dixon*, 31 Vt. 450, 76 Am. Dec. 128; *Merriam v. Rockwood*, 47 N. H. 81; *Passumpsic Bank v. Goss*, 31 Vt. 318.

But was the defendant insurance company led to make the contract of settlement and adjustment in question and to issue the draft in question through a mistake of fact, or through fraud on the part of the plaintiff, and if so can it repudiate the settlement and disallow the draft upon these grounds? We think not.

The only reason for ordering the holding up of the draft which was stated by the secretary of the company at the time of the repudiation was that "the business was shut down and not running at the time of the loss;" and this objection was made merely because the agent of some other insurance company, which was also interested, had claimed that such was the fact, and that "we (the defendant) like to have our re-insurance companies perfectly satisfied in the matter." The only reason for the refusal of its payment after it had been delivered was that it should have been made payable to Prestel, and J. I. and J. S. Crosby,

as their interests might appear instead of to the plaintiff, the Idaho Michigan Lumber Company. "We see no reason," defendants' secretary wrote, "why we should make the check payable to the Idaho-Michigan Lumber Company when the policy reads to a different party. We also notice by the commercial reports that these people turned it into the Idaho-Michigan Lumber Company in 1913, consequently we see no reason why this was written in the name first mentioned therein."

There is positive and undisputed testimony, however, that all of these facts were known to the general agents at the time of the adjustment and at the time of the delivery of the draft. There is also evidence that the fact of the transfer of the property to the plaintiff was communicated to the agents, Douglas & Rice, by the insured with a request to attach riders to the policy to that effect, and that the agents had only failed to report this fact to the company through inadvertence, and that this fact *was called to the attention of the secretary of the defendant company itself in the adjuster's letter which was sent to it on July 13, 1914, and in response to which the draft was mailed.* There is also evidence to the effect that, after the request for the riders, the general agents assured the plaintiff that its property was "covered."

Defendant, it is true, claims that the word "covered" does not mean what it naturally implies, but merely that they would make a notation and at a later date issue a new policy which was then being considered. This contention, however, hardly sounds plausible, and we are sure that no business man would give that meaning to the word. Douglas & Rice, indeed, wrote that "they were *holding* the risk covered," and not that at a subsequent date they would cover it. The letter of the adjuster, also to which we have before referred, absolutely refutes this contention.

Surely the knowledge of these agents must be imputed to their principal, and it must be held as a matter of law that the defendant company, at the time of the acceptance of the settlement and of the signing and transmitting the draft, knew what its agents knew. The adjuster's letter too informs it of these very facts, and Hand (the secretary of the defendant company) himself testified: "We issued the draft after the *receipt of the report of the adjusters with proof of loss and the notice of loss and the letter from Rice dated May 11th, and with full knowledge of all facts disclosed therein.*"

Nor is there any merit in the contention that the adjuster did not

actually visit the premises and know of the vacancy and change of title. He at any rate reported to the general agents, and the general agents had knowledge of these facts." It is also undisputed that the general agents had almost unlimited authority in these matters. Otherwise why the statement of the secretary of the defendant in his letter of August 20th, when he wrote: "Now Mr. Rice, this office has been very negligent in the checks they have paid out for losses under policies written at your office. *We have left this entirely with you*, but under the circumstances above named you will see there is no reason why this loss should be paid."

The general agents in short had actual authority to write the insurance and to adjust the loss, and implied authority, even after the secret withdrawal or suspension of that which was actually given, to deliver the same. Relying upon this implied authority, and upon the adjustment which was made under authority which was actual, and which was ratified and approved by the company with full knowledge of the facts, and by the very act of drawing the draft and transmitting it for delivery, the plaintiff consented to a compromise of its claim and accepted the draft. After this acceptance it could not later have insisted upon repudiating the agreement and receiving a larger sum, unless with the consent of the defendant. Surely now the defendant cannot, in the absence of fraud or mistake, and we find none to have existed, insist upon that repudiation. *Mills v. Lee*, 6 T. B. Mon. 91, 17 Am. Dec. 118; *McCabe Bros. v. Ætna Ins. Co.* 9 N. D. 19, 47 L.R.A. 641, 81 N. W. 426.

"The settlement and contract to pay a specified sum," says the supreme court of New York, in the case of *Smith v. Glen's Falls Ins. Co.* 62 N. Y. 85, "operates as a waiver of any warranty in the policy, unless the settlement and contract were procured by the fraud of the assured; and this is not found, and scarcely claimed. It is said that the company did not know of the breach of the warranty at the time of the settlement. The answer is that when the claim was made for the loss the company was required to ascertain the facts as to any breach of warranty. If they saw fit to pay the claim, or compromise it, or to make a new contract, without such examination, it must be deemed to have waived it; and, in the absence of fraud, it cannot afterwards avail itself of such breach. It cannot urge payment or settlement by mistake on account of a want of knowledge of such breach. The time for investiga-

tion as to breaches of warranty is when a claim is made for payment, and, if the company elects to pay the claim, or, what is equivalent, to adjust it by an independent contract, it cannot afterward, in the absence of fraud, retract or fall back upon an alleged breach of warranty." See also *Ostrander, Fire Ins.* §§ 213, 214, 372; *Commercial Bank v. Firemen's Ins. Co.* 87 Wis. 297, 58 N. W. 391; *Phoenix Ins. Co. v. Van Allen*, 29 Ill. App. 149; *Godchaux v. Merchants' Mut. Ins. Co.* 34 La. Ann. 235.

These being the facts of the case, and the action being based on the settlement, and not on the policy, not only is there no need of a reformation in equity of such policy, but no right of repudiation can be claimed on account of any breaches thereof, if breaches there be.

We are satisfied, indeed, that even if at the time of the issuance of the original policy the general agent of the defendant company was not informed of all of the facts of which it now complains, both it and its general agent had knowledge of these facts not only when the riders were attached (or were conceded to be attached, by their promise that they would keep the property "covered"), but that all of these things were known to both the company and its general agent at the time of the settlement and at the time of sending the draft. Such being the case, the breaches, if any, were waived, and the settlement cannot now be repudiated. 19 Cyc. 780, 784; *McCabe Bros v. Aetna Ins. Co.* 9 N. D. 19, 47 L.R.A. 641, 81 N. W. 426; *Leisen v. St. Paul F. & M. Ins. Co.* 20 N. D. 316, 30 L.R.A. (N.S.) 539, 127 N. W. 837; *Johnson v. Farmers' Ins. Co.* 126 Iowa, 565, 102 N. W. 502; *Georgia Home Ins. Co. v. Holmes*, 75 Miss. 390, 65 Am. St. Rep. 611, 23 So. 183; *Morotock Ins. Co. v. Rodefer Bros.* 92 Va. 747, 53 Am. St. Rep. 848, 24 S. E. 393; *Crittenden v. Springfield F. & M. Ins. Co.* 85 Iowa, 652, 39 Am. St. Rep. 321, 52 N. W. 548.

The judgment of the District Court is affirmed.

**M. T. MCGILVRA v. MINNEAPOLIS, ST. PAUL, & SAULT STE.
MARIE RAILWAY COMPANY, a Corporation.**

(159 N. W. 854.)

Prairie fire — railway engine — evidence — prima facie proof.

1. Evidence examined and held to furnish prima facie proof that a prairie fire had been started by a railway engine.

Statutes — application of — proof — execution of instruments — record of — evidence — rules of.

2. Sections 5569, 5571, and 5572 of the Compiled Laws of 1913 were merely intended to be applicable to proof before the registers of deeds, where unacknowledged instruments are sought to be recorded and in other instances, and, when deeds and leases are sought to be proved, the general rules of evidence apply.

Lease — signature — witness — proof of execution — evidence.

3. Proof that a witness knows the signature of the alleged maker of a lease, and knows that it is his signature that is on the instrument, constitutes prima facie proof of the execution of such instrument, and will entitle it to be introduced in evidence.

Title to lands — record — trustee — lease from — possession under — damages — evidence — prima facie case — collateral attack.

4. Where the record title to land is in "B, trustee," one who holds possession of such land under a lease from such trustee is prima facie entitled to recover damages for the negligent burning of the hay thereon, and as against a collateral attack on such lease, even though there is no proof of the authority of such trustee to execute the same.

Note.—Whether the presumption of negligence arising from the fact that a fire was set by the railroad company's engine necessarily makes the question of negligence one for the jury is discussed in a note in 5 L.R.A.(N.S.) 99.

That the measure of damages for destruction of immature growing crops is their value at the time of their destruction is set forth in notes in 12 L.R.A.(N.S.) 267; 27 L.R.A.(N.S.) 168; 37 L.R.A.(N.S.) 976; and 49 L.R.A.(N.S.) 415, on the measure of damages for injury to, or destruction of, growing crops.

On the liability of a railroad company for setting fire which spread to property of others, see note in 21 L.R.A. 262. Also see notes in 38 Am. Dec. 70; 78 Am. Dec. 185; and 6 Am. Rep. 597,—on the liability of railroad company for fires set by its locomotives.

Prairie fire — lands injured by — soil — burning and scorching — proof — evidence — what is.

5. Where certain land is injured by a prairie fire and the nature and extent of the scorching or burning of the soil is capable of direct proof, evidence is not admissible as to the injuries which have been occasioned by other fires to other lands at other times, the test being the injury to and the effect on the particular land in question.

Article — market price — property of same kind — purchase and sale — subject of — proof — trade — ordinary course of.

6. In order that an article may be said to have a market price, it must be shown that other property of the same kind was the subject of purchase or sale in so many instances that the value became in a measure fixed by a consensus of buyers and sellers in the ordinary course of trade.

Prairie fire — hay — destroyed by — reasonable value — recovery of — value — local market — nearest market — transportation — cost of — uses for which property is kept.

7. Where hay is destroyed by a prairie fire the owner is entitled to recover its reasonable value at the place where and at the time when destroyed, and for the uses and purposes to which it could be reasonably applied. Where there is a fixed local market value, that value usually prevails. Where, however, there is no local market, the value at the nearest market usually prevails, but to this must be added the cost of transportation if the hay is kept for use merely, and from this the cost of transportation will be deducted if it is kept for sale. Where no market price prevails, or the market price is clearly inadequate, a liberal rule of proof obtains, and evidence may be introduced of the prices paid at occasional sales and of the uses for which the hay was kept and adapted as well as of the cost of production.

Hay — value of — farmer — competent to testify — own land — market value — proof of — absence of.

8. A farmer is competent to testify as to the value of hay which is grown upon his own land, and this even in the absence of proof of a market for the same.

Instructions — witnesses — equally credible — means of information — weight of testimony — credit to be given.

9. An instruction to the effect that "when witnesses are otherwise equally credible greater weight and credit should be given to those whose means of information are superior and also to those who swear affirmatively to a fact, rather than to those who swear negatively, or to a want of knowledge or want of recollection, is criticised, but held not to constitute reversible error.

Instruction — one witness — testimony of — credibility — means of knowledge — weight of — comparison — other witnesses — corroboration — circumstances.

10. An instruction to the effect that "I instruct you further that the testimony of one credible witness is entitled to more weight than the testimony of many others, if as to those other witnesses the jury have reason to believe, and believe from the evidence and all the facts before them, that such witnesses are mistaken or have knowingly testified untruthfully, and are not corroborated by other credible witnesses or by circumstances proved in the case, merely states a self-evident fact, and is not erroneous in not being confined to material matters, as it can only be construed to relate to particular matters concerning which the witness has testified and concerning which the jury believes that other witnesses have testified untruthfully, and does not pretend to be an instruction on the credibility of witnesses generally.

Opinion filed October 24, 1916.

Action to recover damages for injury occasioned by a prairie fire.
Appeal from the District Court of McIntosh County, *Frank Allen, J.*
Judgment for plaintiff. Defendant appeals.

Affirmed upon condition.

Lee Combs and *L. S. B. Ritchie*, for appellant.

At common law unattested instruments were only admissible in evidence when the exhibit was proved by someone who was present and saw the execution, or by testimony or admission of the person signing same, or by testimony of someone familiar with the handwriting of the maker. 17 Cyc. 155, 442.

In proving value of personal property, "one who has merely heard of sales is not thereby qualified." *Thompson v. Moiles*, 46 Mich. 42, 8 N. W. 577; *Michael v. Crescent Pipe Line Co.* 159 Pa. 99, 28 Atl. 204.

A witness who bases his evidence as to the value of land upon what he has heard others say about it, or about the purchase and sale of it, is not qualified. *Oregon R. & Nav. Co. v. Eastlack*, 54 Or. 196, 102 Pac. 1011, 20 Ann. Cas. 692.

"Opinion or expert evidence is not admissible to show the effect of fire upon grass upon prairie land, since the effect of a fire is susceptible of direct proof." *Gates v. Chicago & A. R. Co.* 44 Mo. App. 488; *Wesson v. Washburn Iron Co.* 13 Allen, 95, 90 Am. Dec. 181.

Where a verdict is based upon speculative or conjectural evidence, it will be set aside. *Spicer v. Northern P. R. Co.* 21 N. D. 61, 128 N. W. 302; *Minneapolis Sash & Door Co. v. Great Northern R. Co.* 83 Minn. 370, 86 N. W. 451; 33 Cyc. 1396; *Smith v. Northern P. R. Co.* 3 N. D. 17, 53 N. W. 173.

The correct rule of damages in this state in such cases is the difference between the value of land before and after the fire has passed over it, where the owner of the land brings suit. *Cleveland School Dist. v. Great Northern R. Co.* 20 N. D. 124, 28 L.R.A.(N.S.) 757, 126 N. W. 995.

For rented land, the measure would be the rental value. *Quinn v. Chicago, M. & St. P. R. Co.* 23 S. D. 126, 22 L.R.A.(N.S.) 789, 120 N. W. 884.

The instructions of the trial court ignore the rule requiring the limitation of such instructions to the testimony of the witness or witnesses upon material matters in the case. *Schnase v. Goetz*, 18 N. D. 594, 120 N. W. 553; *McPherrin v. Jones*, 5 N. D. 261, 65 N. W. 685; *Remington v. Geiszler*, 30 N. D. 346, 152 N. W. 661.

G. M. Gannon, for respondent.

It is now generally held that a sufficient foundation has been laid by the testimony of a witness who has had correspondence with the person or firm whose signature is sought to be proved, and that the signature in question corresponds with that on the correspondence to entitle such witness to testify, and that such proof, prima facie, entitles the instrument to be received in evidence. *Abbott, Civil Jury Trials*, p. 442, § 25; *Murray v. Walker*, 83 Iowa, 202, 48 N. W. 1078; *Rogers v. Ritter*, 12 Wall. 317, 20 L. ed. 417; 17 Cyc. 155, 428.

Proof of possession of real property is prima facie proof of title, and is all that is required to maintain an action for trespass. *Comp. Laws* 1913, §§ 2799, 7936; 4 *Sutherland, Damages*, 3d ed. §§ 1009-1012; *Ross v. Lawson*, 105 Ala. 351, 16 So. 890; *Smith ex dem. Teller v. Lorrillard*, 10 Johns. 338; *Jackson ex dem. Murray v. Denn*, 5 Cow. 200.

The doctrine that possession, actual or constructive, is all that is necessary to maintain the action of trespass, is elementary. 38 Cyc. 1004; *Abbott, Trial Ev.* 2d ed. 801, 802, chap. 37; *Wigmore, Ev.* § 2515; 4 *Sutherland, Damages*, 3d ed. p. 2955.

In an action against a railroad company for damages from fire, evidence that the locality was uninhabited and that the fire was discovered in dry grass soon after the locomotive had passed, and which fairly negatives other causes, held sufficient to sustain a finding that the fire was set by the locomotive. *W. H. Ferrell & Co. v. Great Northern R. Co.* 114 Minn. 531, 131 N. W. 1135.

Where testimony is conflicting the issue is for the jury. 8 R. C. L. 48.

The measure of damages for the destruction of a valuable commodity for which there is a regular and constant demand is ordinarily the market price at the place where it was destroyed; but when there is no such market, the market price at other places, with cost of transportation, may be shown. *Allen v. Chicago & N. W. R. Co.* 145 Wis. 263, 129 N. W. 1094.

BRUCE, J. This is an action to recover damages for the destruction of hay and injury to real estate by reason of a fire claimed to have been set by the defendant's engine at a point about 3 miles southeast of the town of Wishek, in McIntosh county. A judgment for \$750.08 was entered for the plaintiff, and against the defendant, and the defendant appeals. This opinion is written after a rehearing.

Appellant first contends there was no evidence to go to the jury on the question as to whether the defendant caused the fire. All of the evidence that there is upon the subject is that *a passenger upon a train of the defendant company saw a fire start up at some distance from the railroad track as the train passed.* He said that he did not know whether the fire started from the right of way or not. He, however, said that he saw nobody around the place, that the fire was on the east side of the track, and that he thought the wind was from the west.

In addition to this was the testimony of the plaintiff, that he had followed the trail of the fire to a point near defendant's right of way, but that he could not tell just where it started, as it appeared to have burned in all directions. There is other testimony that the wind was from the northwest and that the track was to the west of the place of the fire.

Meager though this evidence is, we think it was sufficient. Many a man indeed has been hung on circumstantial evidence which was much weaker than that which is before us. The fire started near the railroad

track and on the open prairie. No human beings seem to have been in the neighborhood except the occupants of the train. There is no proof that there was any fire communicating agency in the neighborhood but the engine. The grass was dry and the wind was blowing towards it from the track. The fire seems to have started up almost immediately after the engine had passed the spot. There is no evidence that it was seen before the engine had passed. A *prima facie* case as to the origin of the fire was certainly made by the plaintiff, and this case was in no way rebutted or disproved. *Babcock v. Canadian Northern R. Co.* 117 Minn. 434, 136 N. W. 275, Ann. Cas. 1913D, 924.

We are not unmindful of the case of *Smith v. Northern P. R. Co.* 3 N. D. 17, 53 N. W. 173, on which counsel for the defendant lays much stress in his brief and argument. That case, however, is not in point. It was handed down prior to the enactment of § 4654, Compiled Laws of 1913, which makes railway companies liable for the fires which are started by their engines, irrespective of the question of negligence. It was, therefore, necessary in that case to prove negligence in the operation of the engine or in its equipment. All that the court held was that the mere fact that a fire started 118 feet from the engine was not itself sufficient proof of such negligence, or of the lack of a proper equipment. It was admitted that the fire was started by the engine, and the question of its origin was not involved or discussed. Here the question before us is a question of origin, and not of negligence.

The next point raised is that the plaintiff failed to offer any competent proof of his ownership of the east half of section 1, township 131, range 71, and thus to lay a foundation for the recovery of damages for the destruction of the hay upon said land. It is claimed that his evidence consists merely of a certain agreement which purported to have been signed by John T. Bressler, trustee, and by the plaintiff, and which declared that the said McGilvra had rented the land for the year 1914, and had agreed to pay \$40 "for the use of the above land for hay and pasture purposes for the season of 1914, and thereafter for five years at the same rate, payable in advance, with the privilege to fence the land and remove the same in case the land is sold. This lease made subject to the sale of the land at any time, and may be canceled on date of the sale of the land, and the rental pro rated to that date." It is argued that all the proof that there is of the making of this instrument is the

testimony of the witness Gannon, who testified that he was acquainted with the signature of John T. Bressler, and that the signature on the contract was his. It is argued that § 5569 of the Compiled Laws of 1913 provides that "proof of the execution of an instrument, when not acknowledged, may be made either (1) by the party executing it, or either of them; or, (2) by a subscribing witness; or, (3) by other witnesses mentioned in §§ 5019 and 5020,"—and that §§ 5019 and 5020, Revised Codes of 1905 (being §§ 5571 and 5572, Comp. Laws 1913), merely provide for proof of the execution by proof of the handwriting of the party and of a subscribing witness, and then only:

1. "When the parties and all the subscribing witnesses are dead; or,
2. When the parties and all the subscribing witnesses are nonresidents of the state; or,
3. When the place of their residence is unknown to the party desiring the proof, and cannot be ascertained by the exercise of due diligence; or,
4. When the subscribing witness conceals himself, or cannot be found by the officer by the exercise of due diligence in attempting to serve a subpoena or attachment; or,
5. In case of the continued failure or refusal of the witness to testify for the space of one hour after his appearance."

None of these elements were present in the case which is before us, and the question is whether the statutes in question are applicable in the case at bar, and whether the mere identification of the signature of Bressler and by one not a subscribing witness, was sufficient.

It is clear to us that §§ 5569, 5571, and 5572 of the Compiled Laws of 1913, were merely intended to be applicable to proof before the registers of deeds when unacknowledged instruments are sought to be recorded, and that in other instances the general rules as to proof will apply.

The witness Gannon testified that he knew the signature of Bressler, and that it was his signature that was on the instrument. It is true that he did not testify that he saw Bressler write his name, or that the signature was genuine. The latter fact, however, was of course implied, and in addition to this there was evidence of acts of possession on the part of the plaintiff. A *prima facie* case, therefore, was certainly established. *Jones*, Ev. 2d ed. § 526; *Pullen v. Hutchinson*, 25 Me.

249; Mosher v. Farmers' & M. Nat. Bank, 51 Neb. 55, 70 N. W. 540; Egan v. Murray, 80 Iowa, 180, 45 N. W. 563; Moody v. Rowell, 17 Pick. 490, 28 Am. Dec. 317.

Nor is there any merit in the contention that there is no proof of the authority of the trustee to execute the lease in question. The evidence shows that the title to the land was in John Bressler, trustee, that the lease was executed by John T. Bressler, trustee, and that the plaintiff was occupying the land at the time of the fire. Section 7936 provides that "there shall be a disputable presumption of ownership from possession and from exercising acts of ownership," and § 2799 of the Compiled Laws of 1913 provides that, "in any action instituted in any court to recover damages under the provisions of the foregoing section, it shall not be necessary for the person injured by such fire to allege or prove on the trial of such action, title to the real property over which such fire has spread, but it shall be sufficient in any such action to allege and prove that the person so injured was in the occupancy or possession of such ranch, building, improvement, fencing, timber, or other property, claiming the right to and occupying with cattle any such cattle range, it being the purpose and intention to protect the possession as aforesaid, whether such person has title to such land or not."

Under these provisions the plaintiff was the ostensible owner of the premises, and, without further proof than the mere fact of occupancy, would prima facie be entitled to damages for the loss of his hay.

We now come to the question of the measure of damages, and are called upon to scrutinize the following instructions:

"The court instructs the jury that the measure of damages in cases of this kind is the value of the property at the time and place where it was destroyed, and the jury have the right to arrive at this value from the testimony of the witnesses and other facts and circumstances as disclosed by the evidence; and of the weight and credibility of the witnesses, the jury are the sole judges. In other words, the plaintiff is entitled to recover just compensation in money for the property destroyed, such an amount as will fully restore him to the same property status that he occupied before the destruction. To arrive at the amount of such compensation, inquiry is necessarily confined strictly to the ascertainment of the value of the property destroyed at the time and place of the destruction thereof, and in this connection I instruct you

that whenever there is a well-known or fixed market price for any property, the value of which is in controversy, it is proper, in establishing the value, to take into consideration such market value; but in order to say of a thing that it has a market value, it is necessary that there shall be a market for such commodity, *i. e.*, a demand therefor, and ability from such demand to sell the same when the sale thereof is desired. Where, therefore, there is no demand for a thing,—no demand to sell the same,—then it cannot be said to have a market value at the time when and at a place where there is no market for the same.”

“Therefore, if you find from the evidence that there was at the time of the destruction of the property in question a well-known or fixed market price for the same, then the measure of damages, or, in other words, the amount which the plaintiff is entitled to recover for the destruction of the property, provided you find defendant liable, is its reasonable market value at the time and place it was burned. But I instruct you that the rule as to such only requires a strict limitation as to the market value in cases where such value would be the fairest and the best measure of damages and is ascertainable. What the law requires is certainty as far as possible and an absence of speculation. It does not, however, require the impossible or the unreasonable.”

“On the other hand, gentlemen, if you find from the evidence that there was no market value of the property in question at the time and place of the destruction thereof, then it is your duty in arriving at the true value of the said property at the time and place of the destruction, to take into consideration all the facts and circumstances disclosed by the evidence bearing upon that question, and in such case you have a right to consider what it would cost the plaintiff to replace the property, and in this connection I instruct you, gentlemen, that the owner of personal property may himself testify as to its value, and you have a right to consider such testimony in connection with all of the other testimony introduced here and in connection with all of the facts and circumstances disclosed by the evidence.

“The ultimate question in determining the value of the property in question is, What was it worth at the time and place of the fire? and all I have said upon this question of damages has been said to you with a view to assisting you in determining the answer to this question, What was the personal property in question worth at the time of the fire?

and I instruct you that all that I have said in regard to the measure of damages for the personal property destroyed must be confined to your consideration of the value of the personal property destroyed, and must not be considered by you when you consider the damage done to the real property, if any such damage is disclosed by the evidence in this case, and I instruct you that you are the sole judges in determining what the personal property in question was worth at the time and place of its destruction."

Counsel for appellant insists that the foregoing instructions authorize the jury to give a speculative estimate of the value of the hay burned, and were, therefore, improper. He alleges that it was established that there was a market for hay in the community, and that the market price as testified to should control.

Although we at first entertained a different opinion, we are now satisfied that under the peculiar circumstances of the case this instruction was correct, and that the defendant has no ground for complaint.

After a careful perusal of the evidence, indeed, we are satisfied that though some of the witnesses state, as a matter of opinion, that there was a local market, the evidence shows conclusively, and in fact is undisputed, that there was none. It discloses a situation where, with one exception, the farmers put up hay for themselves alone and sold only in case of a surplus, and which seems rarely to have been the case. The fact that one or two persons at about the time of the fire were able to find and to buy hay of the kind destroyed is no sufficient proof of a steady market or supply, nor of a market price. In order that there may be said to have been a market price which was controlling in the matter, "other property of the same kind must have been the subject of purchase or sale to so great an extent and in so many instances that the value becomes in a measure fixed. *Sloan v. Baird*, 162 N. Y. 327, 56 N. E. 752. The market price of an article is "the *usual* standard for measuring its value, and is the sum fixed by the consensus of buyers and sellers." 3 *Words & Phrases*, 2d ed. 300, 1st ed. vol. 5, 4382. It is the "current price." *Century Dict.* It is "a price established by public sales *in the way of ordinary business.*" *Bouvier's Law Dict.* It is "the price at which they are freely offered in the market to all the world; such prices as dealers in the goods are willing to receive and purchasers are made to pay, when the goods are bought and sold *in the*

ordinary course of trade." Glasgow Steam Shipping Co. v. Tweedie Trading Co. 154 Fed. 84; *Cluquot's Champagne*, 3 Wall. 114, 125, 18 L. ed. 116.

There is no sufficient evidence in the case at bar of such a local market.

The witness Chris Grueble testified that the value of hay around Danzig about the 1st of November was about 5 or 6 dollars a ton. He testified, however, to no sales and to no market, and, as a matter of fact, it is questionable whether his testimony was admissible at all.

The witness Louis Rubin testified that he was familiar with the buying and selling of hay around Danzig.

Q. Do you know whether there was any steady market for hay around Danzig?

A. Not that I know of. People will put up hay for their own use, and if they got any too much, then they sell, but there is not any for to sell whatever, that I know of. I sold some up there about a month and a half ago. I got for it, I believe, about \$6 a ton.

This testimony was inadmissible as far as the sale was concerned, as it occurred a month and a half before the trial, and not at the time of the fire. It, however, did show that there was no steady market even around Danzig, and that people merely put up hay for their own use and sold what they had over.

The witness Phillip Hypel testified that he lived $2\frac{1}{2}$ miles from Venturia, and (in answer to a leading question) that there was a market for hay in the community on the 9th of November, 1914; that at that time he sold some prairie and slough hay mixed; that its fair market value was \$3 a ton, but he didn't know of any other sales.

Q. Do you know of any place you can haul your hay to and immediately dispose of it at a fixed price?

A. Oh yes, in Wishek I got it last fall about November 1st. I could get \$5 a ton for it in Wishek.

He testified, however, that this hay was sold before he had put it up, so that the price must have been fixed early in the year and before the time of the fire.

The witness Conrad Kogler testified that he lived 6 miles from Wishek

and a mile and a half from the land; that he didn't know whether prairie hay had any market price; that he didn't know of any sales in November; that he bought some after the fire and on the 10th of November for \$3 a ton 5 miles south of his place; that the hay was worth \$3 a ton; that he didn't know of any hay that was sold except that which was sold to McGilvra; that he had to haul the hay which he bought to his place; that he didn't know of anybody else who had hay to sell except Geidt, but he put up hay just for that purpose.

The witness Christoph Hiller testified that he lived near McGilvra's; that he saw some of the stack; that that kind of hay had a market value in the community on or about the 9th day of November in the stack; that as far as he knew his neighbors sold some for \$2.50 a ton; that the hay was worth \$3 a ton in the stack; that after the fire that about three weeks before (that is before the trial) McGilvra told him that he had bought some hay. "I wouldn't say for sure, for \$4 or \$4.50 for the load, and he said the load contained two tons;" that the hay was not really slough hay, but it was hay from low ground; that he estimated there was a ton and a half on the rack and he said over 2 tons.

The witness John Kogler testified that he lived about a mile from the land in question; that there was no market for hay like that burned on or about the 9th of November, 1914; that he knew of some sales that were made about that time, but after the fire he bought some hay for \$3 a ton, but he didn't know what was its value at the time and place; that the hay was worth \$3 in the stack. The only sale, however, that he refers to and on which he seems to base his testimony, was that which was bought by his father, Conrad Kogler.

The witness Ed Christy testified that the prairie hay had a market value on November 9th.

Q. Do you know what it was worth, what it could be bought for?

A. No I don't know.

Q. Tell us whether you know that the hay was worth any particular price in that community.

A. I don't know.

Q. I am asking you now what hay was worth in that community last fall on or about the 9th of November in the stack.

A. Three dollars a ton.

I know where I could have bought it for that. I don't know of anything sold for that price.

This testimony showed no local market and no local market value.

All of the definitions presuppose a consensus of buyers and sellers, a current price and numerous sales, and there is no proof that these elements were present in the farming community even if they were present at Danzig or Wishek, and of which we have some question.

Even if there was a market at Wishek or Danzig, there is no lower price testified to at these places than \$5 a ton, and since there was no local market and the plaintiff was entitled to have the hay replaced where burned or its value at that place, the measure of damages would be, not the market price at Wishek or Danzig, but that market price plus the cost of transportation to the place of the fire or the community value, and since the jury returned a verdict of \$5 a ton it is quite clear that they were not induced by anything that was said in the instructions to render their verdict for any greater sum than the price that was paid at the place mentioned. But be this as it may, we are satisfied of the correctness of the instructions and their applicability to the case at bar. There was no local market, and the existence of a market, even at Danzig or Wishek, was a matter of some doubt and was for the jury to pass upon. There is no claim or evidence that the plaintiff's hay was kept merely for purposes of sale. He was entitled to have it replaced where it was destroyed, or rather to be paid its value at that place, its actual replacing being impossible. There being no fixed or local value, and even though there was a market value at Danzig and Wishek, this value would not necessarily control as the places were at least 5 miles distant, and the plaintiff was entitled to the reasonable value of his hay at the time and place of its destruction, and for the uses to which he was putting it or might reasonably have put it. 33 Cyc. 1391.

In all of such cases a liberal rule of proof prevails, and proof of the prices which had been paid both in the immediate neighborhood and at Wishek and Danzig would be competent as tending to show the real value. *Texas & P. R. Co. v. Prude*, 39 Tex. Civ. App. 144, 86 S. W. 1046; *Galveston, H. & S. A. R. Co. v. Rheiner*, — Tex. Civ. App. —, 25 S. W. 971. Under this condition of the facts and of the evidence it was perfectly proper for the court to instruct the jury that the market

value would only be controlling where such value would be the fairest and best measure of damages, and that they could take into consideration all of the facts and circumstances disclosed by the evidence and bearing upon the question, and that the market value would in no event be controlling, and that the prices actually paid would in no event be controlling, unless they were paid in a market where there was a demand for the commodity, and an ability to sell, and a well-known or fixed price.

The defendant could in no event have been prejudiced by the instructions. If market there was, it must have been at Danzig, or at Wishek, and there the lowest price was \$5 a ton, which amount the jury held to be the value of the hay.

Nor can it be said that, outside of this price which was paid at the points mentioned, there was no evidence of the value. The plaintiff testified that the hay was worth \$6 a ton, and it is established that he, as the owner, was competent to so testify. See *Seckerson v. Sinclair*, 24 N. D. 625, 100 N. W. 239; *Texas & P. R. Co. v. Prude*, and *Galveston, H. & S. A. R. Co. v. Rheiner*, *supra*.

But the defendant further excepts to the instruction of the trial court wherein he charged the jury that "when witnesses are otherwise equally credible, and their testimony otherwise equally entitled to equal weight, greater weight and credit should be given to those whose means of information were superior and also to those who swear affirmatively to a fact, rather than to those who swear negatively or to a want of knowledge or want of recollection."

This instruction was criticized in the recent case of *Remington v. Geizler*, 30 N. D. 346, 152 N. W. 661. It was not held, however, in itself to constitute reversible error, nor do we believe that it should be held to constitute reversible error in the case which is before us. There was no conflict in the evidence as to the cause of the fire, nor as to the extent and nature thereof. On the question of values it could not have applied in any way, nor have influenced the jury. Its only possible application could have been to the question of the amount of the hay destroyed, and even here we find that the nature of the testimony is substantially the same, and is based upon measurements of the bases of the stacks, not before but after the fire occurred. It is indeed only in extreme cases that errors such as those complained of should be allowed to overthrow verdicts, and no such extreme case seems to be before us.

Objection is also made to the following instruction: "And I instruct you further that the testimony of one credible witness is entitled to more weight than the testimony of many others, if as to those other witnesses the jury have reason to believe, and believe from the evidence and all the facts before them, that such witnesses are mistaken or have knowingly testified untruthfully, and are not corroborated by other credible witnesses or by circumstances proved in the case."

It is claimed that this instruction was erroneous and misleading. It is also claimed that it was not confined, and that it should have been confined, in its application, to material matters only.

It is not necessary, however, that it should have been confined to material matters. This is not a case of the application of the rule of "false in one matter false in all;" for the instruction in effect merely tells the jury that if as to any *particular* matter there is one witness as against many they may believe that witness as against the many, if they think as to that particular matter the others are mistaken or have not spoken truthfully. We hardly see why it was necessary to give this self-evident instruction at all, but it is not subject to the objections made to it.

We are, however, satisfied that the trial court elsewhere erred in allowing evidence to be introduced as to the effect upon the soil and the growth of grass, which certain prairie fires in the past had had upon other pieces of land than that for the recovery of damages for the injury to which the action was brought.

The witnesses, no doubt, were competent to testify as experts in this particular, but the proper procedure would have been to have first shown this general knowledge and experience of prairie fires and their effects and then to have asked them not what injury had been done by prairie fires in the past to other pieces of land, but what effect the fire in question would have upon the particular land in question; and in response to a hypothetical question which should summarize and assume to be true, the testimony already introduced as to the duration of the fire, its velocity, the condition of the grass before the fire, and whether the fire merely skipped over the tops or burned deeply into the roots of the grass.

On account of these errors as to the injury to the land, we are unable to affirm the judgment as a whole. The special findings, however, dis-

close that all that the jury allowed for these injuries was the sum of \$30. If, therefore, the plaintiff will remit from the judgment rendered the said sum of \$30, the judgment so modified will be affirmed. Otherwise a new trial must be had. The costs and disbursements of this appeal will be taxed against the respondent, but only in the sum of \$25. It is so ordered.

REGENT STATE BANK, a Corporation, Respondent v. GEORGE GRIMM, Appellant and Jacob Graber, R. F. Graber, J. T. Hundley, Engel & Company, a Corporation; Jacob Krier and Pete Wegesser, Doing Business under the Firm Name and Style of Krier & Wegesser; International Harvester Company, a Corporation; and A. A. Lefor, Respondents and L. J. Omdahl and K. K. Omdahl, Interveners and Respondents.

(159 N. W. 842.)

Contract — sale of lands — crop-payment plan — vendee — crops — title to.

Contract construed and held to entitle the vendee in a crop-payment contract to the proceeds of the crop grown in a certain year.

Opinion filed October 5, 1916. Petition for rehearing denied October 24, 1916.

Appeal from the District Court of Hettinger County, W. C. Crawford, J.

Action to foreclose a chattel mortgage.

Controversy as to surplus between the mortgagor and his vendor under a crop-payment contract.

Judgment for vendor.

Vendee appeals.

Reversed and modification ordered.

Charles Simon (Jacobsen & Murray, of counsel), for appellant.

Where land is sold by one person to another under the crop-payment plan, the vendee becomes the full equitable and beneficial owner, and the vendor simply holds the legal title as security for the purchase price. He is a mortgagee, in effect. The vendee was in possession, under such contract. No relation of landlord and tenant exists. *Moen v. Lillestal*, 5 N. D. 327, 65 N. W. 694.

And where such contract provides for the giving of a mortgage on the crops, it is a recognition of the right and title of the vendee,—the mortgagor. *Golden Valley Land & Cattle Co. v. Johnstone*, 21 N. D. 97, 128 N. W. 690.

V. H. Crane, for Hundley, respondent.

The controversy here is between the vendor and vendee. In the case cited, the controversy was between the vendor and the holders of chattel mortgages, and the rule there announced has no application. *Moen v. Lillestal*, 5 N. D. 327, 65 N. W. 694.

BRUCE, J. Although these proceedings originated in the foreclosure of a chattel mortgage which was given by the defendant Grimm to the plaintiff, the Regent State Bank, the controversy is entirely between the defendants Grimm and Handley. The plaintiff, the Regent State Bank, has, indeed, dropped entirely out of the case, as the record discloses that it has satisfied the mortgage out of other property, and that the grain which is in dispute was by agreement sold by the sheriff and the proceeds held to await the outcome of the action. The decree of the district court, indeed, was not one for the foreclosure of the mortgage, but for the proper distribution of the proceeds of the property, which was sold. The controversy, in short, is over the proceeds of the crop of 1914. It is between the vendor, Handley, and his crop-payment vendee, Grimm, and revolves entirely around the construction of the crop-payment contract which was attached to and made a part of the findings of fact of the trial judge.

The question to be determined is whether, under the terms of the contract, Handley was to receive any of the proceeds of the crops prior to the termination of the year 1914.

A close and careful examination of the original contract leads us to believe that the trial judge erred in his findings and conclusions, and that it was the intention of the parties that the proceeds of all of the crops raised should belong to the vendee, Grimm, up to and including the season of 1914.

The contract as we read it, provides:

That he (Grimm) will deliver to said party of the first part (Handley), or his agent, 80 acres crops each year after the years described

above, 1914, of all crops raised each year at Regent, N. Dak., or such other place as may hereafter be mutually agreed upon.

It is true that a careful scrutiny of the carbon copy of the contract (which was signed as the original and stipulated to be such) is required to make this clear; but on the other hand, no scrutiny, however careful, can arrive at any other reading and properly account for all of the type-written words. The confusion, we believe, is due to the paper slipping in the typewriter, so that the words which were intended to be inserted between two of the printed lines were impressed in the carbon copy (which was used and signed as the original) partially above and upon one of them, while some x's which were intended to cross out some printed words were impressed slightly below the words sought to be eliminated, and the words, "Regent N. Dak.," which were intended to be inserted in a vacant space in the printed contract were impressed slightly below the line.

The original printed line was as follows:

One half of all crops raised each year at _____, or such other place as may here—

Upon and slightly above the words, "one half of all crops raised each year at," and slightly above the blank line, and slightly above and upon the words, "or such other place," were impressed the words, "80 acres crops each year after the years described above 1914." Slightly below the words "one half" were impressed 6 x's, and slightly below the line in the vacant space were impressed the words, "Regent, N. Dak."

It is perfectly clear to us that the intention was to x or cross out the words, "one half," where they occurred at the beginning of the printed line, and to insert above these words the new words, "80 acres crops each year after the years described above 1914," then to follow with the printed words, "of all crops raised each year at," then to insert the words, "Regent, N. Dak.," in the blank space, and then to follow with the printed words, "or such other place as may here—."

No other reading, indeed, can be had without ignoring the x's beneath

the words, "one half," entirely, and the position of the words, "Regent, N. Dak." There can be no question that the words mentioned were intended to be inserted in the vacant space, nor that the words "one half" were intended to be erased. Such being the case, any other reading than that given by us would have to be, "all crops raised each year at Regent, N. Dak., 80 acres crop each year after the years described above 1914—or such other place as may hereafter, etc. This reading could surely never have been intended.

Another reason which leads us to the conclusion arrived at is that a subsequent clause of the contract provides that:

It is further agreed that in order to carry out the purpose and intent of the parties hereto, touching said first party _____ receiving the full 80 of each crop, as hereinbefore set out, free and clear of all possible liens and encumbrances, after the year of 1914, it is especially and mutually understood, promised, and agreed that the party of the second part will execute and deliver to the party of the first part, a chattel mortgage on 80 acres of all crops to be sown, grown, and raised on said land and every part thereof, during the life of this contract.

Why, may we ask, if all the crops were to be delivered to the landlord before as well as after 1914, was not a chattel mortgage required before as well as after that date?

We can also well see why no share of the crops should have been demanded by the landlord during the first two years. The vendee, under the contract, was to break and backset 50 acres during the first year and 65 during the second. This would involve much labor and expense and materially increase the value of the land. It might very well have been that the vendor would have thought that this should be all that should be required of his vendee. Not only this, but the vendee was to pay the taxes.

The judgment of the District Court is reversed, and the cause is remanded with directions to modify the judgment so that "the whole of the \$528.35" shall be awarded to the defendant Grimm and not merely \$99.11 as heretofore ordered and adjudged.

On Petition for a Rehearing, Filed October 24, 1916.

BRUCE, J. The defendant and respondent has filed a petition for a rehearing in which he alleges:

1. That upon this appeal the evidence taken upon the trial of the cause was not brought into the record by a properly authenticated statement of the case; and that it is based entirely upon the judgment roll.

2. That upon the trial of the case below, the district court, in making its findings of fact and conclusions of law, had the aid of oral testimony, and was enabled to construe the crop-payment contract involved in the light of such testimony.

3. That, in the opinion written by this court, the crop payment contract is construed without the aid of the testimony adduced upon the trial, or a statement of the case of the proceeding below.

4. That in rendering such decision this court overlooked a principle well settled by the decisions of this state, *viz.* that where the sufficiency of the evidence to support the findings of the court cannot be considered because the appeal is based entirely upon the judgment roll proper, it will be presumed that the findings of the court are fully supported by competent evidence.

He cites as authority the case of *Whitney v. Akin*, 19 N. D. 638, 125 N. W. 470.

We have, however, no quarrel to find with that decision, nor with the rule contended for by the respondent that "where the sufficiency of the evidence to support the findings of the court cannot be considered because the appeal is based entirely upon the judgment roll, it will be presumed that the findings of the court are fully supported by competent evidence." This rule, however, applies merely to the findings of the fact, and not to the conclusions of law, and the presumption therefore is merely that the parol evidence, if any was introduced, sustains the findings of the trial court that the wording of the contract in question was as was given in the copy of the contract which was attached to and made a part of those findings. These findings of fact are conclusive upon us. The question then is one merely of law, and all we are asked to pass upon is whether the conclusion of law of the trial court, that is to say, the legal conclusion as to the meaning of the contract, was justified by the finding of fact as to what the words of the contract actual-

ly were. We agree entirely with the learned trial judge as to what those words were. We only differ with him in his legal conclusion. The question presented to us is one of law and of law alone. We see no reason for receding from our former position, and the petition for a rehearing is therefore denied.

PAUL E. SKJERSETH v. WOODWORTH ELEVATOR
COMPANY.

(160 N. W. 70.)

Conversion—tenant—directing his farm hand to deliver grain—certain elevator—grain hauled to different town—sold to different elevator company—proceeds—kept by man—demand for grain—value of grain at time of demand—verdict—directed for defendant—not error.

Where plaintiff's tenant directed a farm laborer to take his grain to an elevator at Courtenay, to be there left so that it could be divided between plaintiff and his tenant, but instead of doing so the laborer took it to an elevator at Kensal and there sold it and failed to account for the proceeds, an action of conversion will not lie against the latter elevator without proof of a demand for the grain; and where a demand is alleged in the complaint to have been made on the 26th day of May, 1914, and is not proved, but is merely a conversation and inquiry as to the transaction on the 29th day of November, 1913, and there is no proof of the value of the grain on the said 26th day of May, 1914, but merely of its value on the 28th day of November, 1913, it is not error for the trial court to direct a verdict for the defendant.

Opinion filed November 4, 1916.

Action for the conversion of grain.

Appeal from the District Court of Stutsman County, *J. A. Coffey, J.*
Judgment for the defendant. Plaintiff appeals.

Affirmed.

Note.—On conversion of personal property sufficient to constitute trover, see note in 24 Am. St. Rep. 797, discussing the conversion by vendee of property sold without authority, and stating the rule to be that when a sale is made under such circumstances that the seller is guilty of a conversion in making it, the vendee is also guilty of a conversion, if he takes possession of the property pursuant to the same and exercises any dominion over it.

W. H. Padden (George W. Thorpe and Russel D. Chase, of counsel), for appellant.

A warehouse receipt, aside from being an ordinary receipt which is always subject to explanation, is a contract between the warehouseman and the party who delivers the grain, and to whom the receipt is issued. 3 Jones, Ev. § 493.

Lee Combs and L. S. B. Ritchie, for respondent.

There was no foundation laid for evidence on the part of defendant's local agent, as a "managing agent," as defined and understood to be, under the statute. *Brown v. Chicago, M. & St. P. R. Co.* 12 N. D. 61, 102 Am. St. Rep. 564, 95 N. W. 153, 14 Am. Neg. Rep. 169; *Short v. Northern P. Elevator Co.* 1 N. D. 159, 45 N. W. 706; *Balding v. Andrews*, 12 N. D. 267, 96 N. W. 305, 14 Am. Neg. Rep. 615.

A demand upon the elevator company for the grain in question was indispensable, and substantial proof of the market value of the grain at that time, the date of the demand, is also necessary. Courts do not take judicial notice of the value of grain on any date. *Citizens Nat. Bank v. Osborne-McMillan Elevator Co.* 21 N. D. 335, 131 N. W. 266; *Towne v. St. Anthony & D. Elevator Co.* 8 N. D. 200, 77 N. W. 608.

There is no conversion until after a demand and refusal to deliver. *Ibid.*

BRUCE, J. This is an action for the alleged conversion of grain, and the appeal is taken by the plaintiff from a judgment rendered against him on a directed verdict.

The complaint alleges that on the 28th day of November, 1913, the plaintiff Skjerseth was the owner of and in the possession of 121 bushels of wheat, the market value of which on said day was \$86.40; that on said day one Frank Pop wrongfully took said wheat from the possession of the plaintiff and wrongfully and unjustly detained the same; "that thereafter the same came into the possession of the defendant, who refused to deliver them to the plaintiff, although before this action, to wit, on the 26th day of May, 1914, the plaintiff duly demanded of the defendant the possession of the same; that the defendant still unlawfully withholds and detains the said goods and chattels from the possession of the plaintiff to his damage in the sum of \$86.40, with interest thereon

at 7 per cent per annum from the 28th day of November, 1913." A judgment for said amount is then prayed for.

Several assignments of error are presented and argued by counsel for appellant, but all of them may be conceded and yet the judgment must be sustained.

In any view of the case, indeed, the plaintiff utterly failed in his proof, and the trial court was justified in directing a verdict against him.

It is not claimed or pretended that when the agent of the company obtained possession of the grain on November 28, 1913 (if in fact he ever did), that he did so maliciously or with any specific intention to deprive the plaintiff of it. All that is contended, indeed, is that plaintiff's tenant, Korsell, directed a farm laborer, Pop, to take the grain to the Woodworth elevator at Courtenay, the lease providing that it should be there delivered and divided between the landlord and tenant, but that instead of doing this Pop took it to the defendant's (the Woodworth) elevator at Kensal and there sold it.

There is no proof of any demand for a return of the grain, but merely a conversation in relation thereto, and an attempt to trace it, and this on or about the 29th day of November, 1913.

The complaint alleges a demand on the 26th day of May, 1914, and no such demand is proved. Even if proved, then the conversation would take place and the damages would be based on the market value of the grain on that day or the highest value between that date and the verdict. Comp. Laws 1913, § 7168. There is no proof whatever of this value; the value on November 28, 1913, alone being sought to be proved.

The case, indeed, is, as far as we can see, entirely controlled by the cases of *Towne v. St. Anthony & D. Elevator Co.* 8 N. D. 200, 77 N. W. 608 and *Citizens Nat. Bank v. Osborne-McMillan Elevator Co.* 21 N. D. 335, 131 N. W. 266, and *First Nat. Bank v. Minneapolis & N. Elevator Co.* 11 N. D. 280, 91 N. W. 436, and in deference to these decisions the judgment must be affirmed.

It is so ordered.

STATE EX REL. HENRY J. LINDE, Attorney General, and Enoch Lodge of Perfection A. A. S. R. No. 1, Fargo Council Knights Kadosh A. A. S. R. No. 1, Pelican Chapter of Rose Croix A. A. S. R. No. 1, and Dakota Consistory A. A. S. R. No. 1, Fraternal Corporations known as the Scottish Rite Bodies of Fargo, North Dakota, and H. C. Plumley, Relators, v. FRANK E. PACKARD, George E. Wallace, H. H. Steele, State Tax Commission of the State of North Dakota, and as Members of such State Tax Commission, W. R. Tucker, County Auditor of the County of Cass, and as such County Auditor of the County of Cass, and John Wetz, City Assessor of the City of Fargo, County of Cass, and as such City Assessor.

(L.R.A.1917B, 710, 160 N. W. 150.)

Constitution — state — legislative assembly — taxation — property exempt from — use of schools — religion — cemetery — charitable courts.

1. That portion of § 176 of the state Constitution which provides that "the legislative assembly shall by a general law exempt from taxation property used exclusively for school, religious, cemetery, or charitable purposes," was addressed to the legislature, and not to the courts. Its terms looked forward to, and required, "ulterior action upon the part of the lawmaking branch of the government." (Engstad v. Grand Forks County, 10 N. D. 54.)

Legislature — constitutional powers — enactments — personal property — charitable associations — lodges — chapters — councils — commanderies — consistories — profit — not organized for — exclusive use of — exempt from taxation.

2. The legislature did not exceed its constitutional powers by the enactment of subdivision 9 of § 2078 of the North Dakota Compiled Laws of 1913, which provided for the exemption from taxation of the personal and real property owned by charitable associations known as posts, lodges, chapters, councils, commanderies, consistories, and like organizations and associations not organized

NOTE.—The annotation of this case as reported in L.R.A.1917B, 710, is on the effect of fact that property otherwise exempt from taxation is devoted to purposes of a particular society. The cases discussing this question are collected in exhaustive notes in 16 L.R.A.(N.S.) 829, and 26 L.R.A.(N.S.) 696, referred to in the opinion above.

On what is exempt from taxation as charitable institutions, see note in 38 Am. Rep. 300.

for profit, grand or subordinate, and used by them for places of meeting, and to conduct their business and ceremonies; provided, that such property is used exclusively for such charitable purposes.

Masonic organization — building belonging to — used by — exclusively for meeting and lodge purposes — subordinate masonic bodies — taxation — exempt from.

3. A building belonging to a Masonic organization, and devoted exclusively to Masonic use, the greater portion of said building being used for the place of meeting and in which to conduct the business and ceremonies of various subordinate Masonic bodies, and a small portion thereof being occupied by the office of the Grand Secretary of the Masonic Grand bodies of this state, is exempt from taxation under the provisions of subdivision 9 of § 2078, Compiled Laws, North Dakota, 1913.

Opinion filed November 14, 1916.

Original proceedings by the State, on the relation of Henry J. Linde, Attorney General, and Enoch Lodge of Perfection A. A. S. R. No. 1, Fargo Council Knights Kadosh A. A. S. R. No. 1, Pelican Chapter of Rose Croix A. A. S. R. No. 1, and Dakota Consistory A. A. S. R. No. 1, fraternal corporations known as the Scottish Rite Bodies of Fargo, North Dakota, and H. C. Plumley, for the issuance of a writ prohibiting and enjoining the state tax commission and others from assessing and listing for taxation certain property used exclusively for Masonic purposes.

Writ issued.

Lawrence & Murphy, for relators.

The relators are corporations purely and solely for lodge purposes, and for charitable, benevolent, and fraternal objects, and not for profit. They hold and exclusively use their properties for such purposes and objects. Comp. Laws 1913, §§ 5025, 5030, 5032, 5038, 5039, 5042.

All such property, so held and exclusively used, is exempt from assessment and taxation. Laws 1913, chap. 280; Comp. Laws 1913, §§ 2078, 5025-5042.

Every reasonable presumption is in favor of the constitutionality of a statute enacted by the legislature. 8 Cyc. 801; *O'Laughlin v. Carlson*, 30 N. D. 213, 152 N. W. 675; *State ex rel. Linde v. Taylor*, 33 N. D. 76, L.R.A.—, —, 156 N. W. 561; *Cooley*, Const. Lim. 7th ed. 242.

The general rule is that when private property is claimed as exempt

from taxation, the law under which the exemption is claimed will be strictly construed. *Judge v. Spencer*, 15 Utah, 242, 48 Pac. 1097; *State ex rel. Richards v. Armstrong*, 17 Utah, 171, 41 L.R.A. 407, 53 Pac. 981.

There is, however, an exception to this rule, and statutes exempting property used for educational and charitable purposes, or for public worship, should receive a broad and more liberal construction. *Salt Lake Lodge v. Groesbeck*, 40 Utah, 1, 120 Pac. 194, Ann. Cas. 1914C, 940; *Widows' & Orphans' Home v. Com.* 126 Ky. 386, 16 L.R.A. (N.S.) 829, 103 S. W. 354; *People ex rel. Young Men's Asso. v. Sayles*, 23 Misc. 1, 50 N. Y. Supp. 8; *Phillips Academy v. Andover*, 175 Mass. 118, 48 L.R.A. 550, 55 N. E. 841; *Yale University v. New Haven*, 71 Conn. 316, 43 L.R.A. 490, 42 Atl. 87; *St. Mary's Church v. Tripp*, 14 R. I. 307; *Curtis v. Androscoggin Lodge*, 99 Me. 356, 59 Atl. 518; *Massachusetts General Hospital v. Somerville*, 101 Mass. 319; *People ex rel. Church of St. Mary v. Feitner*, 168 N. Y. 494, 61 N. E. 762; *Academy of Sacred Heart v. Ireys*, 51 Neb. 755, 71 N. W. 752; *Cassiano v. Ursuline Academy*, 64 Tex. 673; *Donohugh's Appeal*, 86 Pa. 306; *Warde v. Manchester*, 56 N. H. 508, 22 Am. Rep. 504; *Wesleyan Academy v. Wilbraham*, 99 Mass. 599.

"A constitutional provision merely authorizing the legislature to exempt certain kinds of property does not by itself grant any exemption." 37 Cyc. 885 and cases cited in note 95, 887.

Under the Constitution the legislature was not prevented from exercising its inherent power of exempting such property as they might deem necessary, and as they deemed for the best public policy, so that the people of the state, by an amendment to the Constitution, eliminated the requirement that all property should be taxed; there then remained the power to exempt the property of these relators as it has been exempted by the existing statute. *Wisconsin C. R. Co. v. Taylor County*, 52 Wis. 42, 8 N. W. 833; *Gilman v. Sheboygan*, 2 Black. 510, 17 L. ed. 305; *Cooley, Taxn.* 145; 1 *Desty, Taxn.* 124; *Farris v. Vannier*, 6 Dak. 191, 3 L.R.A. 713, 42 N. W. 31; *Sumner County v. Wellington*, 66 Kan. 590, 60 L.R.A. 855, 97 Am. St. Rep. 396, 72 Pac. 216; *Francis v. Atchison, T. & S. F. R. Co.* 19 Kan. 311; *Ottawa County v. Nelson*, 19 Kan. 237, 27 Am. Rep. 101; *Wheeler v. Weightman*, 96 Kan. 50, L.R.A. 1916A, 846, 149 Pac. 982.

The clause of the Constitution is clearly not self-executing. These various terms look forward to and require action upon the part of the lawmaking branch of the government. *Engstad v. Grand Forks County*, 10 N. D. 54, 84 N. W. 577.

Where the means are not satisfying, any means may be resorted to which are fairly and properly adapted to accomplish the object of the grant of power. *Black, Const. Law*, p. 71; 1 *Kent, Com.* 404; *Sutherland, Stat. Constr.* § 343.

In liquor matters the legislature has defined intoxicating liquors. It has said that "malt liquor" is intoxicating. Thus it has been held that where a party has been arrested, charged with selling malt liquors, proof offered by him that the liquors sold were not intoxicating was held inadmissible, for the reason that the legislature had defined it. *State v. Ely*, 22 S. D. 487, 118 N. W. 687, 18 *Ann. Cas.* 92; *State v. Fargo Bottling Works Co.* 19 N. D. 396, 26 *L.R.A.(N.S.)* 872, 124 N. W. 387; *State v. Certain Intoxicating Liquors*, 76 *Iowa*, 243, 2 *L.R.A.* 408, 41 N. W. 6; *State v. Colvin*, 127 *Iowa*, 632, 103 N. W. 968; *Com. v. Brelsford*, 161 *Mass.* 61, 36 N. E. 677; *Black, Intoxicating Liquors*, § 2; *State v. Frederickson*, 101 *Me.* 37, 6 *L.R.A.(N.S.)* 186, 115 *Am. St. Rep.* 295, 63 *Atl.* 535, 8 *Ann. Cas.* 48.

In the case at bar, the property is exempt from taxation if for no other reason than that the legislature has said so. *Martin v. Mott*, 12 *Wheat.* 19, 6 *L. ed.* 537.

"The legislature is master of its own discretion," and is the sole judge of the means that are necessary to accomplish its purpose, in the exercise of its power over the subject-matter. *Legal Tender Cases*, 12 *Wall.* 457-561, 20 *L. ed.* 287-315; *Hancock v. Yaden*, 121 *Ind.* 366, 6 *L.R.A.* 576, 16 *Am. St. Rep.* 396, 23 N. E. 253; *State ex rel. Clark v. Haworth*, 122 *Ind.* 467, 7 *L.R.A.* 240, 23 N. E. 946; *Legal Tender Cases*, 110 *U. S.* 421, 28 *L. ed.* 204, 4 *Sup. Ct. Rep.* 122; *Cooley, Const. Lim.* 4th ed. 129; *State ex rel. Terre Haute v. Kolsem*, 130 *Ind.* 434, 14 *L.R.A.* 570, 29 N. E. 595.

The contemporaneous exposition of a statute is always important, and sometimes a controlling guide, in its interpretation. 8 *Cyc.* 736, 737, and cases cited in notes; *Chestnut v. Shane*, 16 *Ohio*, 599, 47 *Am. Dec.* 387; *Com. v. Grant*, 2 *Woodw. Dec.* 379; 36 *Cyc.* 1135, 1153; 26 *Am. & Eng. Enc. Law*, 640; *Cooley, Const. Lim.* 255; *Kendall v.*

Kingston, 5 Mass. 534; Jackson v. Washington County, 34 Neb. 680, 52 N. W. 169; Hedgecock v. Davis, 64 N. C. 650; United States v. Moore, 95 U. S. 760, 24 L. ed. 588; Hovey v. State, 119 Ind. 386, 21 N. E. 890; Portland Bank v. Apthorp, 12 Mass. 252; McPherson v. Blacker, 92 Mich. 377, 16 L.R.A. 475, 31 Am. St. Rep. 587, 52 N. W. 469; State v. Gerhardt, 145 Ind. 439, 33 L.R.A. 313, 44 N. E. 469; Faribault v. Misener, 20 Minn. 396, Gil. 347; Moers v. Reading, 21 Pa. 199.

Where a statute, by the acts of the government and by adjudications, has been treated as constitutional, the courts will not inquire into its constitutionality. Ferris v. Coover, 11 Cal. 175; Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572; Harrison v. State, 22 Md. 468, 85 Am. Dec. 658; Carson v. Smith, 5 Minn. 78, Gil. 58, 77 Am. Dec. 539; Railroad Comrs. v. Market Street R. Co. 132 Cal. 677, 64 Pac. 1065; Frost v. Pfeiffer, 26 Colo. 338, 58 Pac. 147.

While not conclusive, legislative construction is quite persuasive. Denver v. Adams County, 33 Colo. 1, 77 Pac. 858; Hovey v. State, 119 Ind. 386, 21 N. E. 890; State ex rel. Barber v. Parler, 52 S. C. 207, 29 S. E. 651, 28 S. E. 1023.

The same is true of construction given and acted upon by the state officers and people for a long time. State v. New Orleans R. & Light Co. 116 La. 144, 40 So. 597, 7 Ann. Cas. 724; Gaar, S. & Co. v. Sorum, 11 N. D. 174, 90 N. W. 799; 1 Kent, Com. 465; Cooley, Const. Lim. 81; Ames v. Kansas, 111 U. S. 449, 28 L. ed. 482, 4 Sup. Ct. Rep. 437; Butte City Water Co. v. Baker, 196 U. S. 119, 49 L. ed. 409, 25 Sup. Ct. Rep. 211; Com. v. Lockwood, 109 Mass. 323, 12 Am. Rep. 699; People ex rel. Lynch v. La Salle County, 100 Ill. 495; Re Washington Street Asylum R. Co. 115 N. Y. 442, 22 N. E. 356; Atty. Gen. v. Preston, 56 Mich. 177, 22 N. W. 261; Scanlan v. Childs, 33 Wis. 663; Lick v. Faulkner, 25 Cal. 405.

The Masonic order is a charitable institution, and its property is used exclusively for charitable purposes. Const. § 175; Comp. Laws 1913, §§ 2078, 5025, 5030, 5038; Philadelphia v. Masonic Home, 160 Pa. 572, 23 L.R.A. 545, 40 Am. St. Rep. 736, 28 Atl. 954; Morris v. Lone Star Chapter, 68 Tex. 698, 5 S. W. 519; Morning Star Lodge, v. Hayslip, 23 Ohio St. 144; Massenburg v. Grand Lodge, F. & A. M. 81 Ga. 212, 7 S. E. 636; Brodie v. Fitzgerald, 57 Ark. 445, 22 S. W.

29; *People ex rel. Huck v. Western Seaman's Friend Soc.* 87 Ill. 246; *Montana Catholic Missions v. Lewis & Clarke County*, 13 Mont. 559, 22 L.R.A. 634, 35 Pac. 2; *Hennepin County v. Brotherhood of Gethsemane*, 27 Minn. 460, 38 Am. Rep. 298, 8 N. W. 595; *Delaware County v. Sisters of St. Francis*, 2 Del. Co. Rep. 149; *New Port v. Masonic Temple Asso.* 108 Ky. 333, 49 L.R.A. 252, 56 S. W. 405; *Bangor v. Rising Virtue Lodge*, 73 Me. 428, 40 Am. Rep. 369; *Green Bay Lodge v. Green Bay*, 122 Wis. 452, 106 Am. St. Rep. 984, 100 N. W. 837; *State ex rel. Hibernian Soc. v. Addison*, 2 S. C. 499; *Salt Lake Lodge v. Groesbeck*, 40 Utah, 1, 120 Pac. 194, Ann. Cas. 1914C, 940.

Charity is not confined exclusively to the handing out of money to the poor and destitute. As that term is used in the Constitution and laws it has a much broader and more significant meaning. As used and as was the intention, it is the embodiment of sympathy and kindness, and to teach and practice these tenets is the aim of this order. *Salt Lake Lodge v. Groesbeck*, 40 Utah, 1, 120 Pac. 197, Ann. Cas. 1914C, 940; *Philadelphia v. Masonic Home*, 160 Pa. 572, 23 L.R.A. 545, 40 Am. St. Rep. 736, 28 Atl. 954; *Swift v. Beneficial Soc.* 73 Pa. 362; *Delaware County Institute v. Delaware County*, 94 Pa. 163; *Donohugh's Appeal*, 86 Pa. 306; *Mitchell v. Franklin County Treasurer*, 25 Ohio St. 144; *Babb v. Reed*, 5 Rawle, 151, 28 Am. Dec. 650; *Burd Orphan Asylum v. School Dist.* 90 Pa. 21; *Hennepin County v. Brotherhood of Gethsemane*, 27 Minn. 460, 38 Am. Rep. 298, 8 N. W. 595; *Indianapolis v. Grand Master*, 25 Ind. 518; *Hibernian Benev. Soc. v. Kelly*, 28 Or. 173, 30 L.R.A. 169, 52 Am. St. Rep. 769, 42 Pac. 3; *Savannah v. Solomon's Lodge*, 53 Ga. 93; *Henderson v. Strangers' Rest Lodge*, 17 Ky. L. Rep. 1041, 17 S. W. 215; *State ex rel. Bertel v. Board of Assessors*, 34 La. Ann. 574; *Petersburg v. Petersburg Benev. Mechanics Asso.* 78 Va. 431; *Fitterer v. Crawford*, 157 Mo. 51, 50 L.R.A. 191, 57 S. W. 532; *Zable v. Louisville Baptist Orphans' Home*, 92 Ky. 89, 13 L.R.A. 668, 17 S. W. 212; *Massachusetts General Hospital v. Somerville*, 101 Mass. 319; *Widows' & Orphans' Home v. Com.* 126 Ky. 386, 16 L.R.A. (N.S.) 829, 103 S. W. 354; *Cathedral of St. John v. Denver*, 37 Colo. 378, 86 Pac. 1021; *Brewer v. American Missionary Asso.* 124 Ga. 490, 52 S. E. 804; *Franklin Square House v. Boston*, 188 Mass. 409, 74 N. E. 675; *Curtis v. Androscoggin Lodge*, 99 Me. 356, 59 Atl. 518; *Com. v. Y. M. C. A.* 116 Ky. 711, 105 Am.

St. Rep. 234, 76 S. W. 522; Kentucky Female Orphan School v. Louisville, 100 Ky. 470, 40 L.R.A. 119, 36 S. W. 921; Episcopal Academy v. Philadelphia, 150 Pa. 565, 25 Atl. 55; Burd Orphan Asylum v. School Dist. 90 Pa. 21; Gerke v. Purcell, 25 Ohio St. 229; Plattsmouth Lodge v. Cass County, 79 Neb. 463, 113 N. W. 167; Allen v. Duffie, 43 Mich. 1, 38 Am. Rep. 159, 4 N. W. 427; Saltonstall v. Sanders, 11 Allen, 470; Chamberlain v. Stearns, 111 Mass. 267; Adye v. Smith, 44 Conn. 60, 26 Am. Rep. 424; Norris v. Thompson, 19 N. J. Eq. 307; Suter v. Hilliard, 132 Mass. 413, 42 Am. Rep. 444; St. Joseph's Hospital Asso. v. Ashland County, 96 Wis. 636, 72 N. W. 43; Hinckley's Estate, 58 Cal. 457; State ex rel. Hibernian Soc. v. Addison, 2 S. C. 499; Y. M. C. A. v. Douglas County, 60 Neb. 642, 52 L.R.A. 123, 83 N. W. 924.

The same is true of the Odd Fellows society and of all the other relators. Savannah v. Solomon's Lodge, 53 Ga. 93; State ex rel. Bertel v. Board of Assessors, 34 La. Ann. 574; Fitterer v. Crawford, 157 Mo. 51, 50 L.R.A. 191, 57 S. W. 532; State ex rel. Hibernian Soc. v. Addison, 2 S. C. 499; Indianapolis v. Grand Master, 25 Ind. 522; Massenburg v. Grand Lodge, F. & A. M. 81 Ga. 212, 7 S. E. 636; Morrow v. Smith, 145 Iowa, 514, 26 L.R.A.(N.S.) 696, 124 N. W. 317, Ann. Cas. 1912A, 1183; Petersburg v. Petersburg Benev. Mechanics Asso. 78 Va. 431; Grand River Lodge v. Crawford, 157 Mo. 41, 57 S. W. 1134; Hibernian Benev. Soc. v. Kelly, 28 Or. 173, 30 L.R.A. 169, 52 Am. St. Rep. 769, 42 Pac. 3.

The meaning of the word "exclusive" is to "exclude;" to "bar;" to "shut out;" "that which is not included." 1 Bouvier's Law Dict. p. 1110; Presbyterian Theological Seminary v. People, 101 Ill. 582; Y. M. C. A. v. Douglas County, 60 Neb. 642, 52 L.R.A. 123, 83 N. W. 926; Stahl v. Kansas Educational Asso. 54 Kan. 549, 38 Pac. 797; Cincinnati College v. State, 19 Ohio, 110; Gerke v. Purcell, 25 Ohio St. 229; People ex rel. Hutchinson v. Collison, 22 Abb. N. C. 52, 6 N. Y. Supp. 711; Salem Lyceum v. Salem, 154 Mass. 15, 27 N. E. 672; Salt Lake Lodge v. Groesbeck, 40 Utah, 1, 120 Pac. 194, Ann. Cas. 1914C, 940; 8 Cyc. 740; St. Paul's Church v. Concord, 75 N. H. 420, 27 L.R.A.(N.S.) 910, 75 Atl. 531, Ann. Cas. 1912A, 350; Book Agents v. Hinton, 92 Tenn. 188, 19 L.R.A. 289, 21 S. W. 321; State, Sisters of Charity, Prosecutor, v. Chatham Twp. 52 N. J. L. 373, 9

L.R.A. 198, 20 Atl. 292; Indianapolis v. Grand Master, 25 Ind. 518; Fitterer v. Crawford, 157 Mo. 51, 50 L.R.A. 191, 57 S. W. 532; Philadelphia v. Masonic Home, 160 Pa. 572, 23 L.R.A. 545, 40 Am. St. Rep. 736, 28 Atl. 954; Hibernian Benev. Soc. v. Kelly, 28 Or. 173, 30 L.R.A. 167, 52 Am. St. Rep. 769, 42 Pac. 3; State v. Fisk University, 87 Tenn. 241, 10 S. W. 284; Widows' & Orphans' Home v. Com. 126 Ky. 386, 16 L.R.A.(N.S.) 844, 103 S. W. 354; Protestant Episcopal Church v. Prioleau, 63 S. C. 70, 57 L.R.A. 606, 40 S. E. 1026.

Property used exclusively for charitable purposes shall be exempt from taxation. Salt Lake Lodge v. Groesbeck, 40 Utah, 1, 120 Pac. 192, Ann. Cas. 1914C, 940; Plattsmouth Lodge v. Cass County, 79 Neb. 463, 113 N. W. 167; Philadelphia v. Masonic Home, 160 Pa. 572, 23 L.R.A. 545, 40 Am. St. Rep. 736, 28 Atl. 954; Savannah v. Solomon's Lodge, 53 Ga. 93; Fitterer v. Crawford, 157 Mo. 51, 50 L.R.A. 191, 57 S. W. 532; Bangor v. Rising Virtue Lodge, 73 Me. 428, 40 Am. Rep. 369; Indianapolis v. Grand Master, 25 Ind. 518; Massenburg v. Grand Lodge, F. & A. M. 81 Ga. 212, 7 S. E. 636; Baltimore v. Grand Lodge, A. F. & A. M. 60 Md. 282; State ex rel. Bertel v. Board of Assessors, 34 La. Ann. 574; Cumberland Lodge v. Nashville, 127 Tenn. 248, 154 S. W. 1141; Book Agents v. Hinton, 92 Tenn. 191, 19 L.R.A. 289, 21 S. W. 322.

Geo. E. Wallace and Frank E. Packard, for defendants.

"All statutes exempting property from taxation must be strictly construed."

"The power to tax rests upon necessity and is inherent in every sovereignty, and there can be no presumption in favor of its relinquishment." Bailey v. Magwire, 22 Wall. 226, 22 L. ed. 852.

"The rule of strict construction has been so often declared by this court, and has been so uniformly held everywhere, that we are not at liberty to regard the question as an open one." Indianapolis v. Grand Master, 25 Ind. 518; Bangor v. Rising Virtue Lodge, 73 Me. 428, 40 Am. Rep. 736; National Council, K. & L. S. v. Phillips, 63 Kan. 799, 66 Pac. 1011; Wheeler v. Weightman, 96 Kan. 50, L.R.A. 1916A, 846, 149 Pac. 977; Lacy v. Davis, 112 Iowa, 106, 83 N. W. 784; State ex rel. Bertel v. Board of Assessors, 34 La. Ann. 574; Engstad v. Grand Forks County, 10 N. D. 56, 84 N. W. 577; Minot v. Philadelphia, W.

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& B. R. Co. 18 Wall. 206, 21 L. ed. 888; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 666, 24 L. ed. 1038; Petersburg v. Petersburg Benev. Mechanics Asso. 78 Va. 431; Book Agents v. Hinton, 92 Tenn. 188, 19 L.R.A. 289, 21 S. W. 322; Baltimore v. Grand Lodge, A. F. & A. M. 60 Md. 280; Fitterer v. Crawford, 157 Mo. 51, 50 L.R.A. 191, 57 S. W. 532; St. Paul's Church v. Concord, 75 N. H. 420, 27 L.R.A.(N.S.) 910, 75 Atl. 531, Ann. Cas. 1912A, 350; Salt Lake Lodge v. Groesbeck, 40 Utah, 1, 120 Pac. 192, Ann. Cas. 1914C, 940; Boston Lodge v. Boston, 217 Mass. 176, 104 N. W. 453; St. Louis Lodge v. Koeln, 262 Mo. 444, L.R.A.1915C, 694, 171 S. W. 329, Ann. Cas. 1916E, 784; Green Bay Lodge v. Green Bay, 122 Wis. 452, 106 Am. St. Rep. 984, 100 N. W. 837; Parker v. Quinn, 23 Utah, 332, 64 Pac. 961; Cincinnati College v. State, 19 Ohio, 110; American Sunday School Union v. Philadelphia (American Sunday School Union v. Taylor) 161 Pa. 307, 23 L.R.A. 695, 29 Atl. 26; First M. E. Church v. Chicago, 26 Ill. 482; Orr v. Baker, 4 Ind. 86; Philadelphia v. Barber, 160 Pa. 123, 28 Atl. 644; Morris v. Lone Star Chapter, 68 Tex. 698, 5 S. W. 519; Cleveland Library Asso. v. Pelton, 36 Ohio St. 259; Phi Beta Epsilon Corp. v. Boston, 182 Mass. 457, 65 N. E. 824, and cases cited; Amherst College v. Assessors, 173 Mass. 232, 53 N. E. 815; Salem Lyceum v. Salem, 154 Mass. 15, 27 N. E. 672; Mason v. Zimmerman, 81 Kan. 799, 106 Pac. 1005; Atty. Gen. v. Detroit, 113 Mich. 388, 71 N. W. 632.

To be exempt from taxation, property must be owned and used exclusively for benevolent and charitable purposes. This must be the paramount and predominant use to which the property is put. Bangor v. Rising Virtue Lodge, 73 Me. 428, 40 Am. Rep. 369; Curtis v. Androscoggin Lodge, 99 Me. 356, 59 Atl. 518; Orono v. Kappa Sigma Soc. 108 Me. 320, 80 Atl. 831; St. Louis Lodge v. Koeln, 262 Mo. 444, L.R.A.1915C, 694, 171 S. W. 329, Ann. Cas. 1916E, 784; Fitterer v. Crawford, 157 Mo. 51, 50 L.R.A. 191, 57 S. W. 532; New England Theosophical Corp. v. Boston, 172 Mass. 60, 42 L.R.A. 281, 51 N. E. 456; State ex rel. Cunningham v. Board of Assessors, 52 La. Ann. 223, 26 So. 872; Atty. Gen. v. Detroit, 113 Mich. 388, 71 N. W. 632; St. Joseph's Hospital Asso. v. Ashland County, 96 Wis. 636, 72 N. W. 43; Hibernian Benev. Soc. v. Kelly, 28 Or. 173, 30 L.R.A. 167, 52 Am. St. Rep. 769, 43 Pac. 3; Y. M. C. A. v. New York, 113

N. Y. 187, 21 N. E. 86; Young Men's Protestant Temperance & Benev. Soc. v. Fall River, 160 Mass. 409, 36 N. E. 57; People ex rel. Blossom v. Nelson, 46 N. Y. 477; 45 Century Dig. p. 686; 18 Century Dig. § 241; 37 Cyc. 931; Book Agents v. Hinton, 19 L.R.A. 289, note; Widows' & Orphans' Home v. Com. 16 L.R.A.(N.S.) 829, note.

The word "charity" as used in the Constitution and statutes relating to exemptions from taxation means "a gift to promote the welfare of others," "gifts for the benefit of the poor," "endowments for the advancement of learning, science, art, and for other useful and public purposes." Philadelphia v. Masonic Home, 160 Pa. 572, 23 L.R.A. 545, 40 Am. St. Rep. 736, 28 Atl. 594; Black's Law Dict. Gerke v. Purcell, 25 Ohio St. 243; Morice v. Bishop of Durham, 9 Ves. Jr. 399, 32 Eng. Reprint, 656; Doyle v. Lynn & B. R. R. Co. 118 Mass. 195, 19 Am. Rep. 431; Kavanaugh's Will, 143 Wis. 90, 28 L.R.A.(N.S.) 470, 126 N. W. 675; Re Centennial & Memorial Asso. 235 Pa. 206, 83 Atl. 684; Words & Phrases, 1st & 2d Series; Bouvier's Law Dict.

"'Benevolent' includes objects and purposes that are not 'charitable.'" Van Syckel v. Johnson, 80 N. J. Eq. 117, 70 Atl. 657; Hegeman v. Roome, 70 N. J. Eq. 562, 62 Atl. 393; Words & Phrases, 1st & 2d Series.

A "fraternity" is a body of men associated for business, pleasure, or social intercourse by some common tie, either mutual or formal. Bouvier's Law Dict.

The mere giving of authority by the statute to such corporations or bodies "to apply its funds and property to charity and benevolent objects pursuant to the purpose for which such association is organized" does not make them "charitable institutions exclusively." Comp. Laws 1913, §§ 5017, 5030.

Neither does "long continued, contemporaneous, and legislative construction" of such statutes affect or make such statutes something they are not.

It is only by final judicial interpretation and construction that the meaning of a law may become known and fixed. 6 R. C. L. 59-62; State v. Stockwell, 23 N. D. 96, 134 N. W. 767; 2 Lewis's Sutherland, Stat. Constr. § 474, p. 891; O'Laughlin v. Carlson, 30 N. D. 218, 152 N. W. 675; State ex rel. McCue v. Blaisdell, 18 N. D. 38, 119 N. W. 360; 8 Cyc. 738; Fairbank v. United States, 181 U. S. 283, 45 L. ed.

862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; 1 Story, Const. §§ 405-407; State ex rel. Morris v. Wrightson, 56 N. J. L. 206, 22 L.R.A. 548, 28 Atl. 56; Stuart v. Laird, 1 Cranch, 299, 2 L. ed. 115; Rogers v. Goodwin, 2 Mass. 475; Cooley, Const. Lim. 84, 85; Scott v. Sandford, 19 How. 393, 15 L. ed. 691; Hepburn v. Griswold, 8 Wall. 603, 19 L. ed. 513; Pingree v. Auditor General (Pingree v. Dix) 120 Mich. 103, 44 L.R.A. 679, 78 N. W. 1025; State ex rel. Atty. Gen. v. Beacom, 66 Ohio St. 507, 90 Am. St. Rep. 599, 64 N. E. 427; McPherson v. Blacker, 92 Mich. 384, 16 L.R.A. 475, 31 Am. St. Rep. 587, 52 N. W. 469; Henry v. Cherry, 30 R. I. 138, 24 L.R.A.(N.S.) 991, 136 Am. St. Rep. 928, 73 Atl. 97, 18 Ann. Cas. 1006; Somerset County v. Pocomoke Bridge Co. 109 Md. 1, 71 Atl. 462, 16 Ann. Cas. 874; State ex rel. Hibbard v. Cornell, 60 Neb. 276, 83 N. W. 72.

The Constitution of each state, so far as it is consistent with the provisions of the Federal Constitution, is the fundamental law of the state and is part of its supreme law, and acts passed by the legislature inconsistent therewith are invalid. 6 R. C. L. §§ 34, 43, 151-153; Page v. Allen, 58 Pa. 338, 98 Am. Dec. 272; Rison v. Farr, 24 Ark. 161, 87 Am. Dec. 52; 37 Cyc. 886; Farris v. Vannier, 6 Dak. 191, 3 L.R.A. 713, 42 N. W. 31.

The legislative determination of the methods, regulations, and restrictions in reference to the subjects of this litigation, is final, except when so arbitrary as to be violative of the constitutional rights of citizens. 6 R. C. L. §§ 117, 154; State v. Fargo Bottling Works Co. 19 N. D. 413, 26 L.R.A.(N.S.) 872, 124 N. W. 387; Feibelman v. State, 130 Ala. 122, 30 So. 384; State v. Fredrickson, 6 L.R.A.(N.S.) 186, and note, 101 Me. 37, 115 Am. St. Rep. 295, 63 Atl. 635, 8 Ann. Cas. 48; Metropolitan Bank v. Van Dyck, 27 N. Y. 536; M'Culloch v. Maryland, 4 Wheat. 431, 4 L. ed. 607; State ex rel. Terre Haute v. Kolsem, 14 L.R.A. 566, and note, 130 Ind. 434, 29 N. E. 595.

It was not the intention of the framers of the Constitution to exempt this class of property from taxation. The debates of the constitutional convention so affirmatively show. Debates of Constitutional Convention, p. 457.

"If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors shall vote for or against them separately."

The amendments here relied upon by the relators were never properly submitted or adopted, and are therefore unconstitutional. Const. § 202; Records of the Sessions of 1911 and 1913; State ex rel. McClurg v. Powell, 77 Miss. 543, 48 L.R.A. 652, 27 So. 927; Knight v. Shelton, 134 Fed. 423; McBee v. Brady, 15 Idaho, 761, 100 Pac. 97; 6 Am. & Eng. Enc. Law, 2d ed. 908; Collier v. Frierson, 24 Ala. 100; Koehler v. Hill, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609; State v. McBridges, 4 Mo. 303, 29 Am. Dec. 636; State ex rel. Hudd v. Timme, 54 Wis. 318, 11 N. W. 785; State v. Swift, 69 Ind. 505; State ex rel. Hahn v. Young, 29 Minn. 474, 9 N. W. 737; Secombe v. Kittelson, 29 Minn. 555, 12 N. W. 519; Kadderly v. Portland, 44 Or. 118, 74 Pac. 710, 75 Pac. 222; Rice v. Palmer, 78 Ark. 432, 96 S. W. 396; State ex rel. Postel v. Marcus, 160 Wis. 354, 152 N. W. 419.

CHRISTIANSON, J. This is a proceeding against the state tax commission, the county auditor of Cass county, and the assessor of the city of Fargo, to prevent them from assessing and listing for taxation certain property belonging to the relators.

Four of the relators are separate and distinct fraternal corporations, and together constitute what is commonly known as the Scottish Rite Bodies of Fargo, North Dakota.

The relators assert that they are constituent parts of the great body known as Free Masons; that the said Masonic Order, of which they are a part, is a benevolent and charitable organization and institution not organized for profit, but organized and existing in this state under and by virtue of the laws of this state relative to such organizations, and that the property sought to be assessed and listed for taxation is used exclusively for such charitable purposes, and is specifically exempted from taxation under the provisions of paragraph 9 of § 2078 of the 1913 Compiled Laws.

The relators further assert that the state tax commission, under the alleged claim that the statute exempting relators' property from taxation is unconstitutional, have directed the city assessor to assess such property and the county auditor to place the same upon the tax rolls as taxable property, notwithstanding the provisions of the statute; and that, unless restrained from so doing, such officers will assess and otherwise in all respects treat such property as taxable; that the said state

tax commission is endeavoring and threatens to require all other assessors and county auditors in the state to assess and cause taxes to be levied against all property of Masonic bodies throughout the state.

Respondents filed an answer wherein they deny that the property sought to be assessed is used exclusively for charitable purposes, and assert "that the paramount use to which the property of relators is put is that of a lodge, and that whatever charity is dispensed by relators is merely incidental, and that the dispensing of charity is not the object of the organization of Masonic bodies." They further assert that paragraph 9 of § 2078, Compiled Laws 1913, is unconstitutional and void for the reason "that it attempts to grant exemption from taxation not contemplated by § 176 of the Constitution, and is broader and more comprehensive than said constitutional provision, and is therefore unconstitutional as violating said § 176 of the state Constitution."

Relators request that we assume original jurisdiction for the reasons, among others, that the questions involved affect directly every organization whose property is declared to be exempted by the provisions of the statute in question; that the questions involved affect directly, not only thousands of citizens, but practically every taxing district of the state of North Dakota; that the taxing officers mentioned are asserting official power, not by virtue of, but contrary to, the laws established by the lawmaking body of the state; that such taxing officials have arrogated to themselves sovereign rights and thereby infringed upon the rights and prerogatives of each and every citizen of the state.

The jurisdiction of the court has not been challenged. The attorney general of the state, who appears as one of the relators, joins in the application, requesting this court to assume jurisdiction; and the members of the state tax commission who appears as attorney for the respondents has filed a written request that this court assume such jurisdiction.

While we are not wholly satisfied that the case presented is one in which we are required to, or necessarily should, exercise original jurisdiction, still in view of all the facts, including the request of the chief law officer of the state and the request of all parties to the proceedings, including the state tax commission, and as it is clearly a matter which affects directly or indirectly every taxpayer in the state, and involves the question of legislative power to deal with the subject of exempting

property from taxation, we have decided to assume jurisdiction of the controversy.

It is well settled that one who is not prejudiced by the enforcement of a legislative enactment cannot question its constitutionality or obtain a decision as to such invalidity on the ground that it impairs the rights of others, and "it has been said that courts cannot pass on the question of the constitutionality of a statute abstractly, but only as it applies and is sought to be enforced in the government of a particular case before the court, for the power to revoke or repeal a statute is not judicial in its character" (6 R. C. L. p. 90), although in some jurisdictions "an exception to this rule has been recognized in some jurisdictions in the case where the jurisdiction of the court itself depends on the validity of a statute, and the attention of the court is brought to that fact by persons interested in the effect to be given to the statute, although not actually interested in the case before the court." 6 R. C. L. p. 90. And under the principle that the constitutionality of a statute cannot be questioned by one whose rights are not affected thereby and who has no interest in defeating it, it is generally held that a public officer who would not be personally liable for his acts has no such interest as entitles him to question the constitutionality of the statute. 6 R. C. L. p. 92. But there are certain well-recognized exceptions to this rule, as where the officer in the discharge of his duties is required to determine which of two different superior boards (one acting under a constitutional and the other under an unconstitutional statute), issuing conflicting orders, has authority to direct him in the discharge of his official duties. *State ex rel. Miller v. Leech*, 33 N. D. 513, 157 N. W. 492.

Whether the respondents in this case have sufficient interest to assert the unconstitutionality of the statute exempting relators' property from taxation is a doubtful question, and one upon which we express no opinion, as the sufficiency of the answer setting forth this defense (while referred to on oral argument) has not been challenged by motion, demurrer, or reply, and all parties virtually concede that the prime and controlling question in this case is whether the statute under consideration is constitutional, and this is in reality the only question that has been properly argued and submitted to this court.

The sole question presented for our determination in this case, there-

fore, is whether subdivision 9 of § 2078 of North Dakota 1913 Compiled Laws is constitutional.

The state Constitution as originally adopted provided that "laws shall be passed taxing by uniform rule all property according to its true value in money, but the property of the United States and the state, county and municipal corporations, both real and personal, shall be exempt from taxation; and the legislative assembly shall by a general law exempt from taxation property used exclusively for school, religious, cemetery or charitable purposes." . . . Const. § 176.

In 1897 the legislature, in compliance with the directions contained in the above-quoted constitutional provision, enacted legislation relating to revenue and taxation, and therein provided that "all buildings belonging to institutions of purely public charity, including public hospitals, together with the land actually occupied by such institution, not leased or otherwise used with a view to profit and all moneys and credits appropriated solely to sustain, and belonging exclusively to, such institutions," should be exempt from taxation. Laws 1897, chap. 126.

The Act of 1897, as well as § 176 of the Constitution, was construed by this court in *Engstad v. Grand Forks County*, 10 N. D. 54, 84 N. W. 577. In that decision this court held that the clause in § 176 of the state Constitution that "the legislature shall by a general law, exempt from taxation property used exclusively for school, religious, cemetery, or charitable purposes," was not self-executing, but "lays a command upon the legislative assembly, and requires that body, by general law, to exempt certain property from taxation, among which is property used exclusively for charitable purposes."

The court further held that the provisions of the act did not apply to property which was owned and operated by an individual, but that only property belonging to an institution was within the provisions of the statute.

In disposing of the contention that the statute, if so construed, would be unconstitutional, the court said: "It may possibly have been the legislative purpose, in enacting the general exemption law embraced in § 1180, *supra*, to fully comply with this constitutional mandate; but we are not at liberty to indulge in mere conjecture as to what was intended. Our duty is to fairly construe the language actually employed by the legislature, and from it determine the legislative intent. In

doing so, *we reach the conclusion, as has been seen, that the legislature did not intend to go as far as the language of the Constitution required it to go.* The legislature, by its language, has not exempted from taxation any and all property devoted exclusively to charitable uses, but has, on the contrary, only exempted so much thereof as belongs to 'institutions' which dispense public charity. But in exempting only a part of the property which is or may be devoted to charitable uses, there has been no violation of any inhibition found in the organic law. *The Constitution required the legislature to exempt what it has exempted; but the law-making body has not perhaps gone to the full extent required by the very broad terms employed in the clause we have quoted from § 176 of the state Constitution.* It is certainly clear to our minds that, notwithstanding the fact that the legislative branch has not seen fit to execute the constitutional mandate to the full measure intended, such omission cannot operate to annul a statute which does execute the mandate, but only in part."

The opinion in *Engstad v. Grand Forks County*, *supra*, was filed on November 22, 1900. The legislative assembly which convened in January, 1901, amended the law construed in *Engstad v. Grand Forks County*, *supra*, and incorporated therein subdivision 9 (the provision involved in this proceeding), which provides for the exemption from taxation of "the personal and real property owned by charitable associations known as posts, lodges, chapters, councils, commanderies, consistories, and like organizations and associations not organized for profit, grand or subordinate, and used by them for places of meeting, and to conduct their business and ceremonies; provided, however, *that such property is used exclusively for such charitable purposes.*" Laws 1901, chap. 152.

The legislative enactment of 1901 contained an emergency clause declaring that an emergency existed "in that there is no exemption from taxation of the class of property mentioned in subdivision 9," and that therefore the act should take effect and be in force from and after its approval.

The same legislature also enacted laws providing that "associations known as lodges, chapters, posts, encampments, councils, commanderies, consistories and other similar organizations, having a seal and working under a charter issued by some grand or sovereign body of a like char-

acter to themselves, of the fraternities or associations commonly known as the various organizations of Free Masons, Independent Order of Odd Fellows, Grand Army of the Republic, Knights of Pythias and other similar benevolent or charitable fraternities or associations, not organized for profit or for fraternal insurance, located in this state, shall, from and after the taking effect of this article, be deemed to be corporations, notwithstanding no articles of incorporation have been filed, and no charter granted by this state. . . . Any such association has power: . . . 9. To apply its funds and property to charitable and benevolent objects pursuant to the purpose for which such association is organized." Laws 1901, chap. 89; Comp. Laws 1913, §§ 5025, 5030.

The legislative intent expressed in the above-quoted statutory provisions seems too plain for doubt. The legislature declared the various Masonic bodies and other like organizations to be "charitable associations." The legislature further declared that the property used by such bodies for places of meeting and to conduct their business and ceremonies is used for charitable purposes. The language used by the legislature is so plain and the legislative purpose and intent so manifest that no doubt can exist. But if the meaning of the statute be deemed doubtful, we are reminded that the foregoing provisions have remained part of the statute law of this state since 1901, although subsequent legislatures have made certain changes in the law designating the property declared to be exempt from taxation. That the same legislature which created the state tax commission also amended and re-enacted the law classifying the property declared to be exempt from taxation, and the provision involved in this controversy (Comp. Laws 1913, § 2078, subd. 9) was re-enacted without any modification whatever. Laws 1911, chap. 290, It was again re-enacted by the legislature in 1913. Laws 1913, chap. 280.

The provision, therefore, has remained a part of the statute law of this state for fifteen years. During this time it has not only been treated as valid by the various administrative officers and boards, but has received the approval of three different legislative assemblies and three different governors. In fact, as we have already stated, it was re-enacted by the same legislative assembly and approved by the same governor who respectively enacted and approved the law creating the

state tax commission itself. The contemporaneous construction placed thereon by the various administrative officers and boards is entitled to great weight, and the acquiescence in and approval of such construction by subsequent legislative assemblies and chief executives ought to dispel all possible doubt as to the legislative intent. 36 Cyc. 1140, 1142; Lewis's Sutherland, Stat. Constr. 2d ed. §§ 472 et seq.

The state tax commission, however, contends that the Masonic bodies are not charitable associations, and that property used for their places of meeting and to conduct their business and ceremonies is not used for charitable purposes; that it was beyond the constitutional power of the legislature to so declare, and that consequently the provision under consideration is unconstitutional. The relators, on the other hand, contend that the Masonic bodies are charitable associations, and that property used exclusively for the Masonic purposes designated in the statute is in fact used exclusively for charitable purposes; that the legislature is vested with power to determine what property is used exclusively for charitable purposes; and that the legislature in exercise of this power has determined that the property of Masonic organizations, when used for places of meeting and to conduct their business and ceremonies of such organizations, is used exclusively for charitable purposes.

Much space has been devoted in the briefs of the respective counsel to, and many authorities have been cited upon, the question of what is meant by the word "charity" and its derivative "charitable." The word "charity," like many other words, has both a lay meaning and a legal meaning. 5 R. C. L. 291. The principle of charity was recognized, even before the adoption of Christianity, by the Roman law. 6 Cyc. 898. And while certain ingredients of the Roman law were incorporated into the common law of England, there was also incorporated with them the ecclesiastical element introduced with Christianity (5 R. C. L. 296; 6 Cyc. 898). And the term "charity" as used in our law "no doubt takes shades of meaning from the Christian religion, which has largely affected the great body of our laws." *Allen v. Duffie*, 43 Mich. 1, 38 Am. Rep. 159, 4 N. W. 427; *First M. E. Church v. Donnell*, 110 Iowa, 5, 46 L.R.A. 858, 81 N. W. 171; *Ould v. Washington Hospital*, 95 U. S. 303, 24 L. ed. 450. And "the oft-recurring prayer, 'This do in work of charity,' in the earliest appeals to the English chancellor by those who had no remedy, shows that the common, if not the

equitable, concept of the term under Christian influences was the same in remote and modern times." 6 Cyc. 898.

In the broadest sense charity includes whatever proceeds from the sense of moral duty or from humane feelings towards others, uninfluenced by one's own advantage or pleasure. 6 Cyc. 897.

Ruling Case Law (5 R. C. L. pp. 292, 293) says: "A precise and complete definition of a legal charity is hardly to be found in the books, but it is certain that in legal parlance the word 'charity' has a much wider significance than in common speech. Probably the most comprehensive and carefully drawn definition of a charity that has ever been formulated is that it is a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature. Another definition capable of being easily understood and applied is that given by Lord Camden as follows: 'A gift to a general public use, which extends to the poor as well as the rich.' The theory of this is that the immediate persons benefited may be of a particular class, and yet if the use is public in the sense that it promotes the general welfare in some way, it has the essentials of a charity. Again, charity has been declared to be active goodness; the doing good to our fellow men, fostering those institutions that are established to relieve pain, to prevent suffering, and to do good to mankind in general, or to any class or portion of mankind."

The question whether a Masonic lodge is, in law, a charitable organization, while a new one in this court, is by no means a new one in the legal annals of this country. This question has been presented to and determined by many different courts, and while there is some conflict among the decisions, the greater weight of authority sustains the view that a Masonic lodge is a charitable organization. See *Morrow v. Smith*, 145 Iowa, 514, 124 N. W. 316, and extended notes to this decision as reported in Ann. Cas. 1912A, 1183, and 26 L.R.A.(N.S.) 696. See also *Fitterer v. Crawford*, 157 Mo. 51, 50 L.R.A. 191, 57

S. W. 532; State ex rel. Bertel v. Board of Assessors, 34 La. Ann. 574; Indianapolis v. Grand Master, 25 Ind. 522; Salt Lake Lodge v. Groesbeck, 40 Utah, 1, 120 Pac. 194, Ann. Cas. 1914C, 940; Platts-mouth Lodge v. Cass County, 79 Neb. 463, 113 N. W. 167; Cumberland Lodge v. Nashville, 127 Tenn. 248, 154 S. W. 1141; 5 R. C. L. 373.

It is unnecessary for us, however, in this case to determine whether a Masonic lodge is a charitable organization. The legislature has determined this question, and in positive and unequivocal terms declared that the several Masonic bodies are charitable organizations, and that their property, when used for the purposes specified in the statute, is used for charitable purposes, and, as such, exempt from taxation. We are not called upon, nor is it our function, to review the correctness of this legislative determination. 6 R. C. L. p. 112. For it must be presumed that the legislature had before it when the statute was passed any evidence that was required to enable it to act; and the passage of the statute must be deemed a finding by the legislature of the existence of the facts justifying the enactment thereof. 6 R. C. L. pp. 102, 111, 112. We have no power to supervise the acts of the legislature, or substitute our judgment for its judgment upon any matter within the scope of its constitutional powers. Our authority is limited to an inquiry into and a determination of whether the legislature has exceeded its constitutional powers, and has arbitrarily classified property as entitled to exemption from taxation on the ground that it was used for charitable purposes, when clearly and unquestionably the property sought to be exempted is not within the class which the legislature has declared it to be.

Every reasonable presumption is in favor of the constitutionality of a legislative enactment, as it is presumed that the legislature acted within its constitutional powers and enacted a valid law. This presumption is conclusive unless it is clearly shown that the enactment is prohibited by the state or Federal Constitution. State ex rel. Linde v. Taylor, 33 N. D. 76, L.R.A. —, —, 156 N. W. 564.

The primary duty of the courts is to construe statutes with reference to the Constitution, and it is only when a statute clearly violates the provisions of the Constitution that the courts may declare the statute to be unconstitutional. 6 R. C. L. p. 103.

The authorities cited furnish small aid in determining the question before us. Most of the decisions cited involved the construction of some particular statute and a determination of whether a Masonic lodge (or some other fraternal body) was, in fact, a charitable organization within the meaning of the particular statute construed. That is true of the decision of the supreme court of Maine in the leading case of *Bangor v. Rising Virtue Lodge*, 73 Me. 428, 40 Am. Rep. 369. It is true of the decision of the supreme court of Massachusetts in *Boston Lodge v. Boston*, 217 Mass. 176, 104 N. E. 453; of the decision of the supreme court of Wisconsin in *Green Bay Lodge v. Green Bay*, 122 Wis. 452, 106 Am. St. Rep. 984, 100 N. W. 837; and of the decision of the supreme court of Michigan in *Atty. Gen. v. Detroit*, 113 Mich. 388, 71 N. W. 632. And the statute construed in the latter case expressly provided that the exemption granted thereby should "not apply to fraternal or secret societies." The question of whether the legislature had constitutional power to classify Masonic lodges as charitable organizations and exempt from taxation their property used exclusively for Masonic purposes was not involved in any of those cases. And while in other decisions constitutional provisions are referred to and considered in connection with the construction of the statute involved, no authority has been called to our attention wherein a court was confronted with a legislative enactment (as in the case at bar) which specifically declared the different Masonic bodies to be charitable organizations, and the property belonging to such bodies and actually used by them exclusively for their corporate or associated purposes to be exempt from taxation, on the ground that such property is used for charitable purposes. And while in many of the different authorities cited, general statutes exempting the property of charitable organizations or property used for charitable purposes from taxation were construed, a great number, in fact a greater number, of the courts found, as a matter of fact, that Masonic bodies are charitable organizations, and as such entitled to the benefits of the general statutes exempting the property of such organizations from taxation. See *Morrow v. Smith*, 145 Iowa, 514, 26 L.R.A. (N.S.) 696, 124 N. W. 316, and authorities collated in an extended note to this case as published in *Ann. Cas.* 1912A, 1187.

The North Dakota Constitution was framed and adopted in 1889. Long prior thereto a number of the courts of this country had declared

the society of Free Masons to be a charitable organization. It was so adjudged by the supreme court of Alabama in 1861 (*Burdine v. Grand Lodge*, 37 Ala. 478); by the supreme court of Indiana in 1865 (*Indianapolis v. Grand Master*, 25 Ind. 518); by the supreme court of Georgia in 1874 (*Savannah v. Solomon's Lodge*, 53 Ga. 93); by the supreme court of Maryland in 1878 (*Appeal Tax. Ct. Const. v. Grand Lodge*, G. O. H. 50 Md. 421); by the supreme court of Louisiana in 1882 (*State ex rel. Bertel v. Board of Assessors*, 34 La. Ann. 574). And in the case of *King v. Parker*, 9 Cush. 71, decided in 1851, the supreme court of Massachusetts held that a trust expressed in a deed to individuals for the use of an unincorporated Masonic lodge was in its nature perpetual, since one of the leading objects of such lodge was that of charity.

In *Burdine v. Grand Lodge*, *supra*, the supreme court of Alabama, said: "The society known as Free Masons has long existed in this country, and in almost or quite every part of it. The purpose and objects of the society have been made public in numerous books, periodicals, and public addresses. From all these sources of information, and from the generally received and accredited judgment of the public, the sole purpose and object with which Masonic institutions acquire money and property, beyond their current expenses as a society (furniture, lights, fuel, stationery, and the like), are for the bestowal of reliefs and charities to the needy. In addition, the 3d and 4th sections of the act to incorporate Masonic lodges in the state of Alabama tend to confirm the belief that the society is eleemosynary in its aims. Under these circumstances, we hold that we will take judicial notice that the grand and subordinate lodges of Free Masons within the state of Alabama constitute a charitable or eleemosynary corporation." 37 Ala. 482.

While not necessary to a determination of this cause, it may be mentioned that relators assert that the charitable nature of the Masonic organization is established by the following facts set out in the petition herein: "The object and purpose of the said order of Freemasonry is philanthropy, benevolence, and to carry out all charitable purposes and objects, all of which is not confined to its members, but extends to all people at large; and that among other objects and purposes is the object and purpose to nurse, care for, and provide for its sick, afflicted, and needy members and their families, and bury the dead; to care for the

widows of its deceased members and educate their orphan children; to contribute to the maintenance and support of certain homes and public sanatoriums for indigent and afflicted persons, located in this state and elsewhere; to furnish the funds necessary to build and maintain tubercular sanatoriums; to contribute to and assist in the support of public institutions of charity; to care for and assist in caring for destitute persons, whether members or not, who may become a charge upon the public of the state of North Dakota; that such things as hereinbefore set out are not confined to the members of the said order and their families, but extends to all who are in need or distress; that among the specific things now being done in furtherance of said objects and purposes are these: The furnishing of the funds necessary to build and maintain a sanatorium for tubercular patients in the state of North Dakota; and to build and maintain a Masonic cottage at Dunseith Sanatorium for tubercular patients; to operate and maintain the Masonic Welfare Association, which organization collects and disburses to indigent and distressed persons who are members of the several Masonic orders funds of many hundred dollars per year, a portion of which said fund is disbursed as a public charity to non-Masons.

"The operation and maintenance of a fund known as an almoner's fund, which fund is collected and disbursed by an officer known as the almoner exclusively in general public charity to the extent of several hundred dollars per year, and which disbursement is made by the almoner secretary, and without being subjected to the supervision of any specific officer or board, and is devoted wholly and exclusively to the needy and distressed among the general public to whom the almoner is referred, or whom he finds by his own investigation.

"The collecting and disbursing to organized public charities such as the State Children's Home, the Crittenton Home, the Front Street Mission in the city of Fargo, the Salvation Army, and like organizations, funds aggregating hundreds of dollars annually, all of which are exclusive public charities.

"The collecting and distributing to its indigent and distressed members and to non-Masons funds amounting to several hundred dollars per year.

"The raising of funds and contributing to public charities such as

the Belgian Relief Fund, Red Cross Funds, Associated Charities, and all matters of public need.

"The maintenance of and assistance in maintenance of employment agencies to assist without charge Masons and their families in finding places of employment.

"That the extent of said benevolent and charitable work of the said order is large and greater than any public charity in the state of North Dakota, and that as an illustration thereof affiant alleges that the said Masonic organization contributes fully one half of the moneys and funds necessary to maintain the Children's Home in Fargo, an institution of great public charity and need.

"Affiant further says that one of the general and primary objects of said order and institution is to apply in general to its members and to all persons the principle of benevolence and philanthropy, and to extend charity in its broadest and highest meaning to any and all persons with whom its members come in contact, and that all of the said property of the relator is used exclusively for the purposes as hereinbefore set out, and that the property in question is only to a minor extent used for administrative purposes, and that less than one tenth of the space of said building before referred to is used in providing offices for the officers engaged in the administration of the business of the said Masonic bodies, and that no revenue or income is received from the use of said properties except that such revenues and income as hereinbefore set out and as derived from the dues of said members is used exclusively for the maintenance of said buildings and to be expended in the foregoing matters of benevolence, philanthropy, and charity, and to carry out the objects and purposes hereinbefore set forth, and that such property is not in any manner used for business purposes."

No attempt was made to define "charitable purposes" in the state Constitution, or to determine what organizations or institutions would be entitled to the benefit of the exemption which the Constitution directed the legislature to put into effect. Nothing was said to indicate any intent to exclude secret or fraternal societies from the benefit of such exemption, or (as in some states) to restrict such exemption to property devoted purely and exclusively to purposes of "*public*" charity.

When the constitutional convention framed, and the people adopted, the Constitution, they not only invested the legislature with power to

exempt from taxation certain classes of property, but they in plain and unmistakable terms directed "that the legislative assembly shall by general law exempt from taxation property used exclusively for school, religious, cemetery or charitable purposes." Const. § 176. This constitutional command was addressed to the legislature, and not to the courts. 6 R. C. L. 58. The provision was not self-executing. Its terms looked forward to, and required, "ulterior action upon the part of the lawmaking branch of the government." *Engstad v. Grand Forks County*, 10 N. D. 54, 84 N. W. 577. The governmental policy therein declared depended upon, and could be put into effect only by, legislative action.

The provision related to taxation,—a matter peculiarly within the province of the legislative department of the government. 37 Cyc. 724. See also State Const. §§ 174 to 181, inclusive. It involved and required the exercise of legislative power to give effect to a governmental policy announced in the Constitution. Consequently, the contemporaneous construction and interpretation given by the legislature is entitled to a great deal of weight, and should not be departed from unless manifestly erroneous. 6 R. C. L. p. 63. See also *Gaar, S. & Co. v. Sorum*, 11 N. D. 174, 90 N. W. 799.

The legislative construction and determination, as we have already stated, was in harmony with the weight of judicial authority in this country. And in our opinion we have no right to say that the legislature exceeded its constitutional authority in enacting the statute under consideration.

It is also suggested by the respondents that the property is not exempt for the reason that the office of the secretary of the Masonic Grand lodge and other grand bodies is maintained in this building. The statutes which we have quoted are not susceptible of this construction. The intent was clearly to exempt from taxation all property belonging to Masonic organizations, and devoted exclusively to Masonic use; *i. e.*, "for places of meeting, and to conduct their business and ceremonies." The legislative intent seems plain. No part of the building is leased for profit or income for business or non-Masonic purposes. The entire property is devoted solely to purposes connected directly with and essential to the maintenance of the Masonic organization in this state. The property is clearly within the provisions of the statute, and it is

our duty to give effect to the law as promulgated by the lawmaking branch of the government.

The writ will issue as prayed for.

RAY SWALLOW v. FIRST STATE BANK, a Corporation.

(160 N. W. 137.)

Trial court—motion for new trial—prevailing party—costs—allowance of—authority—final decision—regardless of.

1. A trial court has authority to award to the prevailing party (who has in no way been in fault and is entitled to a new trial as a matter of right), upon a motion for a new trial, the costs and disbursements incident to such motion, whether such party ultimately becomes the prevailing or losing party in the final judgment which may be obtained in the action.

New trial—order granting—silent as to costs—allowed prevailing party—court—authority.

2. The fact that, in such case, the order granting a new trial is silent as to costs, is not equivalent to an adjudication that costs and disbursements be not allowed to the prevailing party.

Court stenographer—fees paid to—for transcript—for use on motion—properly taxable—necessary disbursements.

3. In such case fees paid the court stenographer for a transcript upon which the motion for a new trial is founded are properly taxed as a necessary disbursement in favor of the prevailing party.

Opinion filed November 14, 1916.

Appeal from the District Court of Hettinger County, *Crawford, J.*
Plaintiff appeals.

Affirmed.

Jacobsen & Murray, for appellant.

The clerk must insert in the entry of judgment on the application of the prevailing party, upon notice, the sum of the allowance for costs as provided by this Code. Comp. Laws, 1913, §§ 7793, 7794, 7800; *Wolfe v. Ridley*, 17 Idaho, 173, 104 Pac. 1014, 20 Ann. Cas. 39.

Where costs on a motion for new trial are in the discretion of the

court, no costs can be allowed unless the court exercises its discretion by awarding them. 11 Cyc. 252.

Costs are statutory, and none can be allowed which do not come within the items specified by the statute. *Casseday v. Robertson*, 19 N. D. 574, 125 N. W. 1045; *Comp. Laws* 1913, § 7793.

V. H. Crane, for respondent.

Upon a motion or other proceeding in an action, costs may be awarded not to exceed \$25 in the discretion of the court. *Comp. Laws*, 1913, § 7804; *Linne v. Forrestal*, 51 Minn. 249, 53 N. W. 547, 653.

Disbursements are allowable. *Comp. Laws* 1913, § 7793.

CHRISTIANSON, J. In 1912, plaintiff recovered judgment against the defendant in the district court of Hettinger county for \$800 damages. The defendant procured a transcript of the evidence adduced, and the proceedings had at the trial, at a cost of \$60.75. Defendant thereupon prepared a statement of the case, which was duly settled, upon which it founded a motion for a new trial, which was granted.

The trial court assigned the following four reasons for ordering a new trial:

"1. That the damages awarded by the jury are so excessive as to convince the court that they were awarded under the influence of passion or prejudice, or given as punitive damages under erroneous instructions by the court as to the amounts of punitive damages, under the first and third causes of action alleged in the complaint. 2. That the evidence, especially that part of the evidence relating to damages, is insufficient to support the verdict. 3. That the instructions of the court as to the rights of the jury to award punitive damages under the first and third causes of action alleged in the complaint are erroneous, to the prejudice of plaintiff. 4. That the instructions of the court, as to the amount which the jury might award to plaintiff as a penalty for failure to furnish a certificate of discharge or satisfaction of a lien upon personal property, when such lien was satisfied by the payment of the debt secured thereby, are erroneous, to the prejudice of plaintiff." The order made no reference to the costs incurred on the motion for a new trial.

Plaintiff appealed from the order granting a new trial. The order was affirmed by this court, and the costs of the appeal directed to be

taxed in favor of the defendant. See *Swallow v. First State Bank*, 28 N. D. 283, 148 N. W. 630.

The cause was again tried in the district court, and resulted in a verdict and judgment in favor of the plaintiff. On December 11, 1914, defendant's attorney filed with the clerk of the district court an itemized, verified statement of costs and disbursements upon the motion for a new trial, which, among other items, included the cost of the transcript. The costs upon the motion for a new trial were thereupon taxed by the clerk of the district court. An application to retax the costs, duly noticed, came on for hearing before the clerk of the district court on December 15, 1914, and resulted in a disallowance of the proposed items of costs and disbursements. Thereafter defendant, upon due notice, moved the court for a review of the re-taxation of costs. Both parties appeared at the hearing of such motion, and the district court entered an order directing the taxation of \$60.75, cost of the transcript, in favor of the defendant. Judgment was entered therefor, and plaintiff appeals.

It is well settled (as appellant asserts) that costs are the creature of, and can be awarded only when authorized by, statute. It is equally well settled that "the party complaining in a court of appellate jurisdiction of alleged errors in the taxation of costs in the court below must affirmatively show some error in the taxation of the costs by some appropriate method, or it will be presumed in support of the action of the lower court that there was no error in the taxation, and as a result of such presumption the taxation of costs by the court below will not be disturbed." 11 Cyc. 168, 169. See also 5 Standard Enc. Proc. 965.

There is nothing in the record to show whether costs were ever taxed on the appeal; nor is there anything to show when the retrial of the action was had, or whether the costs upon such retrial have been finally taxed. All these matters, upon which the record before us is silent, would necessarily be disclosed by the records in the court below, and consequently known to the trial court.

The presumption is that the trial court's order was properly made, and the burden is upon appellant to show wherein it is erroneous. To do this he must present a sufficient record for reviewing the errors assigned. (*Davis v. Jacobson*, 13 N. D. 430, 432, 101 N. W. 314.)

In considering an appeal from a determination involving the taxation of costs, this court does not try the case *de novo* as appellant suggests, but sits merely as a court of review, and as such reviews merely the correctness of the rulings made by the trial court. Consequently, it is a general rule that a party, in order to be heard on appeal, must be able to produce a record showing that the specific objections urged in the appellate court were properly presented in the court below. 5 Standard Enc. Proc. 965; 11 Cyc. 169.

So far as the record in this case shows, plaintiff presented no objections whatever to the taxation of costs, either before the clerk of the district court or before the district court itself. Hence, there is considerable doubt whether appellant has presented any question for our determination in this case. If he has, it is self-evident that the presumptions above referred to must apply with even more than usual force, and if the trial court's determination can be sustained on any conceivable statement of facts not negatived by the record presented on this appeal, it must be so sustained.

Plaintiff contends that no costs or disbursements can be taxed except in favor of the party which finally prevails, *i. e.*, the party in favor of whom final judgment is eventually rendered; that in this case, final judgment was rendered in favor of the plaintiff, and that consequently defendant was not entitled to recover any costs.

Many of our statutory provisions relative to costs were originally adopted by the territorial legislature. This is true of § 7790, Compiled Laws 1913, which was originally adopted by the legislature of the territory of Dakota in 1883. Subdivision 3 of this section, relating the allowance to the prevailing party of costs, provides that there shall be allowed: "To either party, when a new trial shall be had, for all proceedings after the granting of and before such new trial, \$5; for attending upon and taking the deposition of a witness conditionally or attending to perpetuate his testimony, \$2; for drawing interrogatories to annex to a commission for the taking of testimony, \$2; for making and serving a case or case containing exceptions, \$5, except that when the case shall necessarily contain more than fifty folios, there shall be allowed \$2 in addition thereto." This provision was construed by the territorial supreme court in *First Nat. Bank v. North*, 6 Dak. 136, 41 N. W. 736, 50 N. W. 621. In that case the court held that where

a party made a motion for a new trial "on the minutes of the court," and thereafter prepared and served a bill of exceptions in order to obtain a review of the ruling on the motion for a new trial, such party, upon a new trial being directed by the supreme court, was entitled to tax costs as the prevailing party "for making and serving a case . . . containing exceptions." In the same case the court also held that "in such case the fees paid the stenographer for a transcript of the proceeding from which to prepare the bill is taxable under § 4, chap. 52, Laws 1879; Comp. Laws 1913, § 484, providing that stenographer's fees for transcripts 'shall be taxable costs.'"

The particular provision relating to stenographic fees construed by the territorial legislature has subsequently been eliminated from the statute where it was then found, but language of similar import and far more specific in its terms has been incorporated in § 7793, Comp. Laws 1913, which reads: "In all actions and special proceedings the clerk must tax as a part of the judgment in favor of the prevailing party his necessary disbursements as follows: The legal fees of witnesses and of referees and other officers, the necessary expenses of taking depositions and of procuring evidence necessarily used or obtained for use on the trial, the legal fees for publication, when publication is made pursuant to law *and the legal fees of the court stenographer for a transcript of the testimony when such transcript is used on motion for a new trial or in preparing a statement of the case.*" Under our statutes a court stenographer is a recognized officer of the district court, and entitled to charge and receive certain fixed prices for the preparation of a transcript. Comp. Laws 1913, §§ 774, 780.

"The practice of all our courts," said De Witt, J. (*Waite v. Vinson*, 18 Mont. 410, 45 Pac. 552), "is to try cases with the aid of stenographic reporters. If the defeated party wishes to move for a new trial upon a statement of the case, he must in some way procure a copy of the evidence, in order to construct his statement. He must obtain this evidence from the reporter, or he must make it out from memory, or he must take it down as the case is being tried. To require him to take it down as the case is being tried is, under modern practice, wholly impracticable. The court would not wait for him to write it out in longhand; and, furthermore, during the trial of the case he would not know that he would require it. The necessity for the evidence would

arise only after he had been defeated on the trial. Again, to require counsel to produce a statement of the evidence from his own memory is also impracticable. One object of having a stenographer is to attain accuracy. If counsel are to be relegated to the old system of writing out a statement from memory, the stenographer may as well be dismissed from the court. Furthermore, the judge, in settling the statement, would be much more likely to settle it correctly if he had a stenographer's transcript than he would if he were obliged to rely upon the conflict of memory between the respective counsel and between the counsel and the judge. We are certainly of opinion that the expense of the transcript of the testimony in preparing the motion for a new trial is a necessary disbursement. We are informed that it is so held in the practice in the two largest districts of the state,—districts which furnish much more than a majority of all the business of this court."

Costs are frequently allowed and required to be taxed in interlocutory proceedings even before final judgment is entered. In this case, for instance, the defendant under the order of this court became entitled to tax the costs upon the appeal immediately upon the return of the remittitur. And in the case of *First Nat. Bank v. North*, supra, the appellant was permitted to tax as costs against the respondent the amount paid for the transcript and the statutory allowance "for making and serving a case containing exceptions," upon the return of the remittitur and before the retrial of the action. In fact, the statute recognizes that the question of allowance or taxation of costs does not necessarily depend upon the recovery of final judgment, by providing that "whenever it shall be necessary to adjust costs in any interlocutory proceeding in an action or in any special proceeding, the same shall be adjusted by the judge before whom the same may be heard, or the court before which the same may be decided or pending, or in such other manner as the judge or court may direct." Comp. Laws 1913, § 7800.

Our statutes relative to new trials make no reference to the matter of costs. And the rulings of the different courts, predicated as they are upon different statutory provisions, furnish very little aid in determining the question before us. The general rule, however, seems to be that where a new trial is granted as a matter of favor, *i. e.*, on some ground resting within the sound discretion of the trial court, the court

may even require the applicant to pay the cost of the former trial as a condition precedent to a new trial; but where a party has in no way been in fault, and is entitled to a new trial as a matter of right, the court has no right to impose terms upon the moving party. *Corbett v. Great Northern R. Co.* 28 N. D. 136, 150, 148 N. W. 4.

In the case at bar, defendant was not at fault. A fair trial had been denied. Defendant was entitled to a new trial as a matter of right. A statement of case must be prepared, and in order to do so a transcript was necessary. Defendant concededly paid the court stenographer \$60.75 therefor. The cost of such transcript was clearly a necessary disbursement upon the motion for a new trial. A trial court is expressly authorized to award costs upon any motion. (Comp. Laws 1913, § 7804. See also Comp. Laws 1913, § 7800.) And we believe that where a prevailing party, entitled to a new trial as a matter of right, is compelled to make certain disbursements incident to such motion, a trial court has authority to award to such party as a necessary disbursement "incident to the proceedings" the moneys expended for a stenographer's transcript.

Appellant, however, contends that this allowance should have been made, if at all, in the order granting a new trial; and that as such order was silent in regard to costs incurred on the motion for a new trial, the trial court must be deemed to have exercised its discretion against the allowance of such costs. In support of this contention appellant cites 11 Cyc. 252. The text in Cyc. is based upon certain decisions of the New York supreme courts, and these decisions are in turn based upon and involve the construction of a specific statutory provision of that state, and consequently have no bearing upon the question before us.

It would probably be better practice to incorporate in the order granting a new trial specific directions respecting the costs of the proceeding, but we are by no means satisfied that failure to do so amounts to a denial of costs to the successful party. The general policy of our statutes is to allow costs to the prevailing party. This applies equally to proceedings in the trial and appellate courts. (See Comp. Laws 1913, §§ 7789, 7793, 7794, 7797, and 7798.) It is only in certain specified cases that a trial or appellate court has any discretion in regard to costs. (See Comp. Laws 1913, §§ 7795, 7796.) The

allowance of costs to the successful party is the rule; the disallowance thereof the exception. As a general rule the decisions of this court do not in so many words adjudge costs to the successful party on appeal, but, unless a contrary direction is made, the decision carries costs in favor of the party prevailing on appeal as an incident to such determination. This is so even in certain cases wherein this court is vested with discretion regarding costs; as for instance where a new trial is ordered (Comp. Laws 1913, § 7796); in such case, costs are allowed as a matter of course to the party prevailing on appeal, unless a contrary direction is given in the decision. In the decision affirming the order granting a new trial in this case no reference was made to costs (see 28 N. D. p. 293), but costs were nevertheless allowed to the prevailing party on the appeal. This also seems to be the rule in other states. In *Jarrait v. Peters*, 151 Mich. 99, 114 N. W. 870, the court said: "While § 11,271, 3 Mich. Comp. Laws, leaves the costs within the discretion of the court in a case where a new trial is ordered, by general direction to the clerk, the journal entry always included an award of costs in case of reversal or affirmance, unless direction to the contrary be given in the opinion." In *Bliss v. Little*, 64 Vt. 133, 23 Atl. 725, the court said: "As to costs in this court, it is so much of course for the prevailing party to have them, that it is understood, as a matter of practice, if nothing is said about them, that they are adjudged to him by implication." See also *State ex rel. Jefferson County v. Hatch*, 36 Wash. 164, 78 Pac. 796; *Crittenden v. San Francisco Sav. Union*, 157 Cal. 201, 107 Pac. 103.

In the case at bar defendant was entitled to a new trial, not as a matter of discretion, but as a matter of right. The trial court had no right to impose terms or costs upon the defendant as a condition for granting a new trial; nor could the costs of the first trial be assessed against the defendant even upon a final determination of the action in plaintiff's favor. (*Corbett v. Great Northern R. Co.* 28 N. D. 136, 150, 148 N. W. 4.) The costs of the motion for a new trial, therefore, must either abide the final determination of the action or be allowed to the party prevailing upon the motion.

The trial court construed the order granting a new trial as allowing the necessary disbursements, *i. e.*, the cost of the transcript, to the party prevailing upon the motion. We believe this construction was correct. The decision of the District Court is affirmed.

C. L. MERRICK COMPANY, a Corporation, v. MINNEAPOLIS,
ST. PAUL, & SAULT STE. MARIE RAILWAY COMPANY,
a Corporation.

(160 N. W. 140.)

Common carrier — legal rates — excessive charges — action to recover — Federal supreme court — decisions of — prior decisions — res judicata — rates — confiscatory.

Action to recover from a common carrier a sum alleged to have been unlawfully exacted by it from plaintiff in excess of the legal rate for transporting lignite coal between July 1, 1907, and March 5, 1910. The rate exacted was concededly in excess of the rate prescribed by chap. 51, Laws 1907, but defendant and respondent railway company seek to justify the retention of such excess charge because of the decision of the Federal supreme court in *Northern P. R. Co. v. North Dakota*, 236 U. S. 585, 59 L. ed. 735, L.R.A.—, —, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1, wherein it was adjudged that such statutory rates were confiscatory and void as applied to the facts there considered. But when that case was before this court it upheld such rate statute (see 19 N. D. 45, 25 L.R.A.(N.S.) 1001, 120 N. W. 869), and its decision was affirmed on writ of error (see 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423), with the proviso, however, that it should be "without prejudice to the right of the railway company to reopen the case by appropriate proceedings, if, after adequate trial it thinks it can prove more clearly than at present the confiscatory character of the rates for coal."

Held, that such prior decisions are as to defendant railway company *res judicata* upon the issue there determined as to the confiscatory or nonconfiscatory character of the rates as applied to the facts there considered, and such decisions are in no way affected by the later decision of the Supreme Court of the United States above cited, which involve only issues arising out of new facts sub-

NOTE.—The recovery back of excessive payments to public service corporations is discussed in a note in 18 L.R.A.(N.S.) 124, in which cases holding that overcharges paid to secure the transportation of goods, with interest, can be recovered, will be found.

On right of attorney general, or other representative of state, to maintain action to enforce or prevent the violation of statutory regulations affecting rates, see note in 18 L.R.A.(N.S.) 664.

On legislative power to fix tolls, rates, or prices, see note in 33 L.R.A. 183.

Elements entering into determination of reasonableness of railroad rates prescribed by the state for local traffic are discussed in notes in 15 L.R.A.(N.S.) 108, and 25 L.R.A.(N.S.) 1001.

sequently occurring. (See 236 U. S. 585, 59 L. ed. 735, L.R.A.—, —, P.U.R. 1915C, 277, 35 Sup. Ct. Rep. 429.)

It is accordingly held that the rates exacted by defendant were in excess of the legal rates in force during the period in controversy, and plaintiff is entitled to recover such excess with interest.

Opinion filed November 17, 1916.

Appeal from District Court, Burleigh County, *W. C. Crawford, J.*

From a judgment in defendant's favor, plaintiff appeals.

Reversed and judgment directed for plaintiff.

Miller, Zuger, and Tillotson, for appellant.

The rate established in the manner prescribed by law is the lawful rate until it is set aside upon further evidence as the result of greater experience in applying it, and if then modified, it can only affect subsequent transactions. *Wilcox v. Consolidated Gas Co.* 212 U. S. 19-52, 53 L. ed. 382-400, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

A rate fixed by the legislature shall remain in effect until a decision by the court. *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 360, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; N. D. Const. § 142.

John L. Erdall, John E. Greene, G. F. Dullam, and William G. Porter (A. H. Bright, of counsel), for respondent.

The plaintiff in the Merrick Case was a citizen and resident of the state of North Dakota when the state case was commenced. The latter was brought on behalf of all of the citizens of North Dakota, and all citizens of the state are bound by the final judgment entered therein. *State ex rel. Davis v. Willis*, 19 N. D. 225, 124 N. W. 706.

These points once litigated, the public interest requires that it should be at rest. *Ashton v. Rochester*, 133 N. Y. 187, 28 Am. St. Rep. 619, 30 N. E. 965, 31 N. E. 334.

When a judgment is rendered by a competent court awarding a writ of mandamus against a board of supervisors or other body or officer having power to audit claims against a county or other municipality, commanding them or him to audit a claim or demand against the county or municipality, and it is audited in obedience to such command, the

validity of the claim cannot be questioned subsequently by the taxpayers in any collateral action or proceeding. *McConkie v. Remley*, 119 Iowa, 512, 93 N. W. 505; *Fulton v. Pomeroy*, 111 Wis. 663, 87 N. W. 831; *People ex rel. Chilcoat v. Harrison*, 253 Ill. 625, 97 N. E. 1092, Ann. Cas. 1913A, 539.

Where a proceeding is filed by the state's attorney in the name of the people on the relation of certain citizens and electors representing the general public, all individuals constituting the public are regarded as represented and will be bound by the decree or judgment rendered. *McEntire v. Williamson*, 63 Kan. 275, 65 Pac. 244; *State ex rel. Howard v. Hartford Street R. Co.* 76 Conn. 174, 56 Atl. 506; *Bank of Kentucky v. Stone*, 88 Fed. 383; *Bear v. Brunswick County*, 122 N. C. 434, 65 Am. St. Rep. 711, 29 S. E. 719; *Stone v. Winn*, 165 Ky. 9, 176 S. W. 933; *State ex rel. Blair v. Center Creek Min. Co.* 262 Mo. 490, 171 S. W. 356; *Kansas City Exposition Driving Park v. Kansas City*, 174 Mo. 425, 74 S. W. 979; *Orcutt v. McGinley*, 96 Neb. 619, 148 N. W. 586; *Worrell v. Landis*, 42 Okla. 464, 141 Pac. 962; *Hovey v. Shepherd*, 105 Tex. 237, 147 S. W. 224; *Central Bank & T. Corp. v. State*, 139 Ga. 54, 76 S. E. 587; *State ex rel. Forgues v. Superior Ct.* 70 Wash. 670, 127 Pac. 313; *Greenberg v. Chicago*, 256 Ill. 213, 49 L.R.A.(N.S.) 108, 99 N. E. 1039; *People ex rel. Graff v. Chicago, B. & Q. R. Co.* 247 Ill. 340, 93 N. E. 422; *People ex rel. Atty. Gen. v. Detroit, G. H. & M. R. Co.* 157 Mich. 144, 121 N. W. 814; *Meza v. Pfister Co.* 54 Wash. 7, 102 Pac. 871; *Lee v. Independent School Dist.* 149 Iowa, 345, 37 L.R.A.(N.S.) 383, 128 N. W. 533; *Pierce v. Pierce*, 139 Mo. App. 416, 122 S. W. 1147; *Leet v. Gratz*, 137 Mo. App. 208, 117 S. W. 642; *Davis v. Davis*, 24 S. D. 474, 124 N. W. 715; *Spokane Valley Land & Water Co. v. Jones*, 53 Wash. 37, 101 Pac. 515; *Freeman*, Judgm. 4th ed. § 178; *Black*, Judgm. § 584; 23 Cyc. 1269.

To entitle a judgment to be pleaded as *res judicata* it must be a final judgment, covering the same issues. *Willcox v. Consolidated Gas Co.* 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; 23 Cyc. 1128; *Bostwick v. Brinkerhoff*, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; *Kingman & Co. v. Western Mfg. Co.* 170 U. S. 675, 42 L. ed. 1192, 18 Sup. Ct. Rep. 786; *Dusing v. Nelson*, 7 Colo. 184, 2 Pac. 923; *Lamprey v. Pipe*, 28 Fed. 30; *Macfarland v. Byrnes*, 187 U. S. 246, 47 L. ed. 162, 23 Sup. Ct. Rep.

107; *Clark v. Kansas City*, 172 U. S. 334, 43 L. ed. 467, 19 Sup. Ct. Rep. 207; *Hasletine v. Central Nat. Bank*, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49; *McCurdy v. Middleton*, 90 Ala. 99, 7 So. 655; *Roemer v. Neumann*, 26 Fed. 332; *Australian Knitting Co. v. Gormly*, 138 Fed. 92; *Union & Planters' Bank v. Memphis*, 107 Tenn. 66, 64 S. W. 13; *Harrow v. Johnson*, 3 Met. (Ky.) 578; *Wolfe v. Potts*, — Tenn. —, 42 S. W. 189; *People ex rel. Johnson v. Miller*, 195 Ill. 621, 63 N. E. 504; *Johnson v. Hesser*, 61 Neb. 631, 85 N. W. 894; *Minor v. New Orleans*, 115 La. 301, 38 So. 999.

"The general rule is that a judgment is conclusive, for the purposes of a second action between the same parties or their privies, of all facts, questions, or claims which were directly in issue and adjudicated, whether the second suit be upon the same or a different cause of action." 23 Cyc. 1302.

The rule is that the estoppel extends to every material allegation or statement which, having been made on one side and denied on the other, was at issue in the cause, where the judgment was rendered upon the merits, whether on demurrer, agreed statement, or verdict. *Aurora v. West*, 7 Wall. 82, 19 L. ed. 42; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905.

The estoppel extends to every material allegation or statement which, having been made on one side and denied on the other, was an issue in the cause, and was determined therein. *Aurora v. West*, 7 Wall. 102, 19 L. ed. 49; *Van Pelt v. McGraw*, 4 N. Y. 113; *Bryan v. Atchison*, 2 La. Ann. 462; *Scuddy v. Shaffer*, 14 La. Ann. 576; *Plicque v. Perret*, 19 La. 318; *Gilman v. Horseley*, 5 Mart. N. S. 664; *Dufour v. Camfranc*, 11 Mart. 607, 13 Am. Dec. 360; *Patterson v. Bonner*, 14 La. 233; *Martin v. Martin*, 5 Mart. N. S. 170; *Manhattan Trust Co. v. Trust Co. of N. A.* 46 C. C. A. 322, 107 Fed. 328; *Iowa County v. Mineral Point R. Co.* 24 Wis. 118; *Lamb v. Wahlenmaier*, 144 Cal. 91, 103 Am. St. Rep. 66, 77 Pac. 766; *Litch v. Clinch*, 136 Ill. 410, 26 N. E. 580; *Casler v. Shipman*, 35 N. Y. 545; *Roarty v. McDermott*, 146 N. Y. 302, 41 N. E. 30; *Hermann v. Allen*, 103 Tex. 382, 128 S. W. 116; *Thornton v. Berry*, 101 Ga. 608, 29 S. E. 24; *Franklin County v. German Sav. Bank*, 142 U. S. 93, 99, 35 L. ed. 948, 950, 12 Sup. Ct. Rep. 147; 23 Cyc. 1300-1302; *Southern P. Co. v. United States*, 168 U. S. 48, 42 L. ed. 376, 18 Sup. Ct. Rep. 18; *Stone v. Winn*, 165 Ky. 9, 176 S.

W. 939; *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195; *State ex rel. Blair v. Center Creek Min. Co.* 262 Mo. 490, 171 S. W. 358; *Kansas City Exposition Driving Park v. Kansas City*, 174 Mo. 429, 74 S. W. 979; *Greenberg v. Chicago*, 256 Ill. 213, 49 L.R.A.(N.S.) 108, 99 N. E. 1041.

The prohibition of the Constitution was doubtless intended simply to prevent a common carrier from applying a different rate than that fixed by the legislature pending litigation. It was not the intention to prevent an adjustment between the carrier and the shipper after the litigation should be ended in accordance with the final judgment entered. This construction is in accord with the law as it is generally understood and administered, and avoids any conflict with the Federal Constitution. N. D. Const. § 142; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Solum v. Northern P. R. Co.* — Minn. —, 157 N. W. 996; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Huntington v. Attrill*, 146 U. S. 657, 683, 684, 36 L. ed. 1123, 1133, 1134, 13 Sup. Ct. Rep. 224; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 492-495, 38 L. ed. 793, 795, 796, 14 Sup. Ct. Rep. 968.

FISK, Ch. J. Plaintiff seeks to recover a sum alleged to have been wrongfully exacted from it in excess of the legal rate for hauling lignite coal between July 1, 1907, and March 5, 1910.

Defendant had judgment in the lower court and plaintiff appeals. The facts are not in dispute, and, as found by the trial court, are as follows, omitting the first two findings relating to the corporate capacity of the parties:

(3) That between the first day of July, 1907, and the first day of March, 1910, the defendant received and transported for the plaintiff a considerable number of carloads of coal within the state of North Dakota; that the defendant charged and collected therefor the rates duly prescribed by its tariffs, which rates so charged and collected exceeded in the aggregate the rates prescribed by chap. 51 of the Laws of North Dakota for the year 1907, by the sum of three hundred thirty-two and 8/100 dollars (\$332.08).

(4) That the defendant refused to deliver said coal or any part thereof unless the plaintiff would pay said tariff rates, and plaintiff paid the same under protest.

(5) That before the commencement of this action plaintiff demanded of defendant that it refund to the plaintiff all rates charged and collected on such coal shipments in excess of the rates prescribed by said chap. 51, but defendant refused to repay the same or any part thereof.

(6) That on or about the 7th day of August, 1907, the attorney general of North Dakota, on behalf of and in the name of the state of North Dakota, commenced an action in the supreme court of that state against the defendant. In his petition the attorney general pleaded in substance that chap. 51, of the Laws of 1907, had been duly enacted, and that it was and had been in force ever since the first day of July, 1907; that defendant refused to comply with it and was charging rates in excess of the rates prescribed by it; that the defendant was violating said law, and threatened to continue to violate the same; that the entire people and all citizens of the state were vitally interested in the rates charged for the transportation of coal. The petition prayed for an injunction enjoining the defendant from violating said law.

The defendant made answer to this petition and pleaded, among other things, that said chapter 51 was void for the reason that it violated the 14th Amendment to the Federal Constitution.

(7) That on the 22d day of May, 1909, after a hearing was duly had in said action, the supreme court of the state of North Dakota made and entered its judgment in favor of the state and against the defendant, wherein it was ordered and adjudged, among other things, as follows: "That said act, to-wit, chap. 51 of the Laws of 1907, is valid and constitutional; that the petitioner is entitled to the relief asked, and further that a writ issue herein requiring the defendant to put in force the rates prescribed by said act."

(8) That on the application of the defendant a writ of error was duly issued out of the Supreme Court of the United States to review the judgment of the state court last referred to. The decision of the United States Supreme Court was filed on March 14, 1910, Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423. The mandate of the United States Supreme Court to the state court, among other things, provided as follows: "It is now hereby ordered and

adjudged by this court that the judgment of the state supreme court in this cause be, and the same hereby is, affirmed with costs, but without prejudice to the right of the railway company to reopen the case by appropriate proceedings, if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal."

(9) That on the 13th day of September, 1910, pursuant to the mandate of the Supreme Court of the United States the state supreme court entered a judgment in said action which, among other things, provided as follows: "It is hereby ordered and adjudged that the judgment heretofore rendered and entered by this court be and the same is hereby affirmed, but with the modification that such affirmance is without prejudice to the right of the railway company to reopen the case by appropriate proceedings, if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal."

(10) That on the 3d day of July, 1911, pursuant to said mandate of the United States Supreme Court and said judgment of the state supreme court last referred to, the defendant filed its petition to reopen said case and to take further testimony showing the confiscatory character of the rates for coal. The supreme court of the state thereupon granted said petition. Thereafter further testimony was taken, and after having duly considered the same the supreme court of the state made and filed its further opinion embodying findings of fact and conclusions of law which are reported in 26 N. D. 438, 145 N. W. 135. Judgment was entered in accordance with said findings in said state supreme court on the 2d day of February, 1914, adjudging that "the writ of injunction heretofore issued herein requiring and commanding the defendant to put and keep in force the rates prescribed in the act is hereby made permanent and in all things affirmed."

(11) That thereafter upon the application of the defendant a writ was again duly issued out of the Supreme Court of the United States to review the judgment last mentioned. The decision of the United States Supreme Court was filed on or about the 8th day of March, 1915, and is reported in 236 U. S. 585, 59 L. ed. 735, L.R.A.—, —, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1, whereby the judgment of the state supreme court of February 2d, 1914, was reversed; that on the 9th day of April, 1915, the Supreme Court

of the United States issued its mandate to the state supreme court in accordance with the opinion last referred to.

(12) That thereafter, on the 9th day of July, 1915, the supreme court of the state pursuant to the mandate last referred to entered its final judgment in said action between the state and the defendant adjudging and decreeing, among other things:

"1. That the judgment of this court in this cause be and such judgment is hereby reversed and set aside.

"2. That this action be and the same is hereby dismissed.

"3. That the defendant, Minneapolis, St. Paul, & Sault Ste. Marie Railway Company, recover against the plaintiff, the state of North Dakota, its costs herein in the Supreme Court of the United States; to-wit, \$42.90, and its costs in this court which are taxed and allowed at \$_____."

"It is further adjudged and decreed that the clerk enter this judgment and decree *nunc pro tunc* now as of June 15th, 1915."

(13) That there was no substantial change in the railroad of the defendant located in the state of North Dakota between the first day of July, 1907, and the first day of July, 1911; that there was no substantial change in the lignite coal mines tributary to the line of the defendant in North Dakota during the time last mentioned. All lignite coal handled intrastate by the defendant during this period came from the same mines. That there was no substantial difference in the cost of handling the intrastate lignite coal traffic on the line of the defendant during this period; that the conditions under which such traffic was handled on the lines of the defendant during this period were substantially the same; the only material difference being that the tonnage gradually increased from eighty-seven thousand two hundred sixteen (87,216) tons in 1907 to two hundred five thousand thirty-eight (205,038) tons for the year ending June 30th, 1911; that the railroad connections between this defendant and other railway companies, so far as it related to the handling of intrastate lignite coal, were the same during this entire period, and such traffic was handled as between the carriers in the same way and under the same conditions.

The assignments of error challenge the correctness of the conclusions of law, which are as follows:

"1. That chap. 51, of the Laws of North Dakota, as applied to the

defendant herein, was from the date of its enactment in conflict with the 14th Amendment to the Federal Constitution, and hence unconstitutional and invalid *ab initio*.

"2. That the action brought in the name and on behalf of the state by the attorney general, referred to in the findings of fact, was brought on behalf of all the citizens of the state; that the proceedings in said suit in the name and on behalf of the state constituted one action in which there was only one final judgment; namely, the judgment entered as of the 5th day of June, 1915; that the proper construction and necessary effect of the judgment last referred to was to finally determine that said chapter 51, as applied to this defendant was unconstitutional from the date of its enactment and that the plaintiff was and is conclusively bound thereby.

"3. That § 142 of the Constitution of North Dakota, if it applies to the present case, is void and inoperative because it is repugnant to and violates said 14th Amendment to the Constitution of the United States.

"4. That judgment be entered herein dismissing the action of the plaintiff and for costs and disbursements in favor of the defendant.

"5. It is therefore ordered that judgment be entered herein in favor of the defendant in accordance with the foregoing findings of fact and conclusions of law."

Appellant contends, in brief, that the decisive question on this appeal is not whether the rates fixed by chap. 51, Laws 1907, were or were not confiscatory during the period covered by this complaint, but, on the contrary, whether the rate exacted by defendant from the plaintiff was in excess of the legal rate at that time. Respondent concedes that if the rates prescribed in chap. 51 were lawful and enforceable as applied to defendant during the time involved, the plaintiff is entitled to recover, otherwise not. It is therefore apparent that the controversy arises out of a difference of opinion as to the legal effect on the rights of these parties of the prior litigation in the case of *State ex rel. the Attorney General v. this defendant*. Were the rates prescribed by chap. 51, Laws 1907, in the light of such prior litigation, legally enforceable during the time here in question?

As disclosed by the findings in the case at bar, this court on the first hearing in such prior case adjudged such statutory rate reasonable, and not violative of the 14th Amendment to the Federal Constitution, and

ordered its writ to issue, commanding the defendant to put the same in force. (See 19 N. D. 45, 25 L.R.A.(N.S.) 1001, 120 N. W. 869.) Such judgment was on March 14, 1910, in all things affirmed by the Supreme Court of the United States (see 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423), but with the following qualification: "But without prejudice to the right of the railroad company to *reopen the case by appropriate proceedings*, if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal."

Thereupon, and pursuant to the mandates of this and the Supreme Court of the United States, defendant put into effect the rates prescribed by chap. 51, and continued them in force for the period of over one year, when it applied to this court for leave to reopen the case pursuant to permission thus granted it by the Supreme Court of the United States. The case was accordingly reopened and proof offered tending to show the confiscatory character of such rate during the fiscal year immediately prior to the reopening of such case. Upon such proof this court again adjudged such rate to be reasonable, but, upon writ of error to the court of last resort, it was held that such rates were confiscatory as to the defendant company, and the judgment of this court was reversed. It is now contended by respondent, and the learned trial court, in effect, held, that the plaintiff, by such last decision, is precluded from a recovery upon the alleged ground that the last decision of the United States Supreme Court, in effect, declared chap. 51 unconstitutional and void *from the date of its passage*, and that such last decision reversed and set aside the prior decisions of this court and of the United States Supreme Court.

If this contention is sound, it inevitably follows that both this and the Supreme Court of the United States, by their first mandates, forced defendant to put into effect unlawful and confiscatory rates during the period from March 14, 1910 to March 8, 1915.

We are clear that such contention is unsound. The first decision was final in so far as it put the statute into effect. In other words, it is *res judicata* as to the matters therein determined, and the last decision merely adjudicates that such statutory rates are confiscatory as applied to the facts shown to exist during the period between March 14, 1910, and July 3, 1911.

The fallacy in respondent's contention, as we view it, lies in the unwarranted assumption that the latter judgment relates back and supercedes the first. When respondent applied for and was granted leave to make a new showing as to the confiscatory character of the statutory rates, it amounted in legal effect to the commencement of a new action to determine a new issue; to-wit, whether as applied to and in the light of facts *subsequently arising*, such statutory rates are confiscatory. The case was not reopened for the purpose of relitigating the issues formerly decided, nor was the former decree in any way affected. This is made clear by the recent decision of the Supreme Court in *Missouri v. Chicago, B. & Q. R. Co.* 241 U. S. 533, 60 L. ed. 1148, 36 Sup. Ct. Rep. 715, wherein that court very lucidly explains the meaning of the words "without prejudice" as used by it to qualify its affirmance of the first decree. We quote: "In a rate case where an assertion of confiscation was not upheld because of the weakness of the facts supporting it, the practice came to be that the decree rejecting the claim and giving effect to the statute was, where it was deemed the situation justified it, qualified as 'without prejudice,' not to leave open the controversy as to the period with which the decree dealt, and which it concluded, but in order not to prejudice rights of property in the future, if, from future operation and changed conditions arising in such future, it resulted that there was confiscation. And the same limitation arising from a solicitude not to unduly restrain in the future the operation of the law came to be applied where the asserted confiscation was held to be established. In other words, the decree enjoining the enforcement of the statute in that case was also qualified as without prejudice to the enforcement of the statute in the future if a change in conditions arose. The doctrine in the first aspect nowhere finds a more lucid statement than the one made on behalf of the court by Mr. Justice Moody in *Knoxville v. Knoxville Water Co.* 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148. It has since been repeatedly applied in language which, in the completest way, makes the meaning of the limitation 'without prejudice' in such a case clear, and leaves no ground for any dispute whatever on the subject. *Willcox v. Consolidated Gas Co.* 212 U. S. 19, 53 L. ed. 382, 48 L.R.A. (N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; *Northern P. R. Co. v. North Dakota*, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423; *Louisville v. Cumberland Teleph. & Teleg. Co.* 225 U. S.

430, 56 L. ed. 1151, 32 Sup. Ct. Rep. 741; *Missouri Rate Cases* (*Knott v. Chicago, B. & Q. R. Co.*) 230 U. S. 474, 57 L. ed. 1571, 33 Sup. Ct. Rep. 975; *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 59 L. ed. 1244, P.U.R.1915D, 577, 35 Sup. Ct. Rep. 811. A complete illustration of the operation of the qualification is afforded by the *North Dakota* case, just cited, since in that case, as a result of the qualification 'without prejudice,' the case was subsequently reopened, and upon a consideration of new conditions arising in such future period, a different result followed from that which had been previously reached. *Northern P. R. Co. v. North Dakota*, 236 U. S. 585, 59 L. ed. 735, L.R.A. —, —, P.U.R.1915C, 277; 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1. As to the second aspect, that is, the significance of the limitation 'without prejudice' as applied to a decree which enjoined the rates as confiscatory, the meaning of the reservation as we have stated it was in express terms, through an abundance of precaution, defined and stated in the opinion in the *Missouri Rate Cases* (*Knott v. Chicago, B. & Q. R. Co.*) 230 U. S. 474, 508, 57 L. ed. 1571, 1594, 33 Sup. Ct. Rep. 975.

"Let us test the merit of the respective contentions by these propositions.

"(a) It is insisted that the right obtains to assert, as against the individual suit of the state, the existence of the confiscation for the very period covered by the previous finding that there was a failure to establish the confiscation, because the reservation 'without prejudice,' which was made in that decree, leaves the whole subject open for a renewed attack as to individuals, and, indeed, by general complaint as to the unconstitutionality of the law as a whole. But this proposition simply disregards the foundation upon which such a reservation came to be applied, as we have just pointed out, in cases involving an assault upon the present and future operation of a law fixing rates. In other words, the contention but accepts the doctrine previously announced, and yet repudiates the cases by which that doctrine was established, by affixing a meaning to the reservation 'without prejudice,' as used in the cases, wholly destructive of the sole object and purpose for which, in those cases, the reservation came to be applied. Again, it is said, conceding that the limitation 'without prejudice,' when applied to a rate case, under the authorities, has the significance which we have

affixed to it, that meaning should only prevent the reopening of the inquiry as to the period embraced by the testimony in the case, and therefore should not be extended so as to prevent the reopening from the time, at least, of the close of the testimony. This, it is said, must be the case, since there might well be a change in conditions between the time when the proof in a case was taken and the entry of the final decree. But this contention again disregards the doctrine upon which, as we have pointed out, the reservation in rate-making cases came to be applied. In other words, it treats the reservation 'without prejudice' as looking backward, and overthrowing that which was concluded by the decree, instead of considering it in its true light, that is, as looking forward to the future, and providing for conditions which might then arise."

The above opinion was handed down since the oral arguments in the case at bar, and respondent has recently filed a supplementary brief in which it attempts to distinguish the case at bar from the above case. We have, however, carefully considered the argument advanced in such supplementary brief, and we are constrained to the view that the Federal supreme court's opinion is in point and decisive of the case at bar.

We cannot, indeed, believe with counsel for the respondent that the eminent Chief Justice, who wrote that opinion and who sought to explain the meaning of the term "without prejudice" as used both in the case before him and the North Dakota case, spoke inadvisedly and without a clear recollection of the facts and the state of the record.

We must, indeed, remember that § 142 of the Constitution of North Dakota provides that "the legislative assembly shall have power to enact laws regulating and controlling the rates of charges . . . ; provided, that appeal may be had to the courts of this state from the rates so fixed; *but the rates fixed by the legislative assembly or board of railroad commissioners shall remain in force pending the decision of the courts.*"

The legislature had spoken and fixed the rates. An appeal was taken to the supreme court of North Dakota, and those rates were approved. On the writ of error to the Supreme Court of the United States, the judgment of the state court was upheld, the constitutionality of the rate statute was not questioned or passed upon, nor was the validity under the Federal Constitution of § 142 of the Constitution of North

Dakota even questioned, and it goes without saying that the supreme court of North Dakota cannot question the validity of its own Constitution. The judgment of the Supreme Court of the United States was, it is true, "without prejudice," but in the meantime the rates fixed by the legislature had been approved, and were certainly *prima facie* valid.

The opinion of the supreme court of North Dakota in the first case was filed on April 16, 1909, and the decision of the Supreme Court of the United States was filed on March 14, 1910. In the suit at bar plaintiff seeks to recover for overcharges up to that time, that is to say on shipments made from July 1st, 1907 to March 5, 1910.

In the subsequent and second case, which was started under the permission to reopen, evidence was confined to coal hauled, and to expenses of operation incurred from June 30, 1910, to June 30, 1911. None of the coal now under consideration was hauled during the period covered by the evidence in the second trial and embraced in the second decision of the Supreme Court of the United States.

How, then, can it be said that that court held the statute to be void from its inception and that the rates prescribed by the North Dakota legislature were confiscatory from July 1st, 1907, to March 5, 1910.

In the light of these views it follows that the judgment must be reversed and judgment entered for plaintiff for the sum prayed for in its complaint. It is so ordered.

ROY M. FARMER v. C. D. HOLMES and J. E. Bakke, Partners as
Holmes & Bakke.

(160 N. W. 143.)

Quantum meruit — action on — test of — work done — at request of defendant — reasonable value.

1. The test of an action on the *quantum meruit* is that the plaintiff shall first allege the doing of the work, at the request of the defendant, and that for the work he reasonably deserves to have a specified sum.

NOTE.—The general rule is that a broker has performed his contract and is entitled to his commissions when he is the procuring cause of sale, even though the

Complaint — quantum meruit — cause of action.

2. Complaint examined, and held to state an action on the *quantum meruit*.

Landowner — agent to sell — sending lists to — prospective purchasers — influence by agent — at request of landowner — services of agent — reasonable value of — recovery may be had.

3. If a landowner sends to an agent various lists of land at a certain net price, and the agent interests a prospective purchaser, and such purchaser refuses to pay the list price and wants more land than that offered, and is referred by the agent to the principal to see if he can make a deal with him, and the principal keeps on dealing with the prospective purchaser both by himself and through the agent, and urges the agent to continue using his influence with the purchaser, and afterwards the principal meets with the purchaser alone and effects a sale for less than the list price and for more land than actually listed, but yet contemplated in the transactions between the purchaser and the agent, such agent can recover from such principal and on the *quantum meruit* a commission on such sale for his services performed.

Real estate agent — furnishes buyer — terms of — sale made — satisfactory to client — services — reasonable value — may recover.

4. Where a real estate agent furnishes a buyer upon terms which, even though not originally contemplated, are satisfactory to his clients, and a sale is made on such terms, such agent will be entitled to recover the reasonable value of his services rendered.

Real estate agent — procuring cause — of sale — jury — question for.

5. Whether the real estate agent was in fact the procuring cause of the sale which was consummated is held in the case at bar to be a question for the jury, and not for the court, to pass upon.

Real estate agent — employment of — lists of lands furnished — procures buyer — acceptable to principal — third party — agent acts through — immaterial.

6. Where a real estate agent is employed to furnish a buyer upon terms acceptable to his principal, and such principal is himself to consummate the agree-

sale is effected by the owner himself, as will be seen by an examination of the cases in an extensive note in 44 L.R.A. 321, on when real estate broker is considered as the procuring cause of the sale or exchange effected.

On effect upon the right to commissions, of fact that the owner sells to broker's customer at reduced price, see notes in 15 L.R.A.(N.S.) 272, and 34 L.R.A.(N.S.) 1050.

On right of broker to recovery of commissions on *quantum meruit* in case of a revocation of his authority, see note in 38 L.R.A.(N.S.) 369. On his right to so recover when he secures a purchaser for part of the property, see note in 51 L.R.A.(N.S.) 258. Also see note in 139 Am. St. Rep. 235.

ment or sale, it is immaterial whether such agent acts by himself or through a third party, and whether there is one or two joint vendees, provided the vendee or vendees are acceptable to the principal, and which fact will be presumed from the mere closing of the deal.

Offer of proof — evidence — exclusion of — error — assignment.

7. A party must offer to prove the facts sought to be elicited from his witness before he can assign error upon an objection sustained to a question, the competency of which is not apparent on its face.

Instructions — jury — procuring cause — original discovery — broker — purchaser.

8. It was not an error to instruct the jury that "the words procuring cause as applied to this case mean, that if you find from a fair preponderance of the evidence that the contract was as plaintiff claims, then a procuring cause means the original discovery of the purchaser by the broker, and the starting of the negotiations by him, together with the final closing by or on behalf of his client with the purchaser."

Opinion filed November 18, 1916.

Appeal from the District Court of Cass County, *Chas. A. Pollock, J.*
Action to recover for commissions earned.

Judgment for plaintiff. Defendants appeal.

Affirmed.

Lawrence & Murphy, for appellants.

"Recollections are somewhat dim and impressions deceitful and illusory, but the written words stand and speak a uniform language."
Kent v. Manchester, 29 Barb. 595; 1 Moore, Facts, p. 16.

"If the amount of compensation is fixed by express contract, the broker is not entitled to a reasonable compensation independently of the contract." 19 Cyc. 236; *McDermott v. Abney*, 106 Iowa, 749, 77 N. W. 505; *Beatty v. Russell*, 41 Neb. 321, 59 N. W. 919; *Evans v. Gay*, — Tex. Civ. App. —, 74 S. W. 575; 4 R. C. L. § 67, p. 332; *Beatty v. Russell*, 41 Neb. 321, 59 N. W. 919.

Where the agent finds no purchaser on the terms of the contract with his principal, he cannot recover compensation. Even if he furnished information that was beneficial, there would, at most, be only a moral obligation to pay. *Babcock v. Merritt*, 1 Colo. App. 84, 27 Pac. 884.

It is immaterial that the principal himself made the sale, where

there is no proof that any purchaser produced by the broker was ready and willing to buy at the price named in the contract. *Illingsworth v. Slosson*, 19 Ill. App. 614; *Childs v. Ptomey*, 17 Mont. 509, 43 Pac. 714; *Ball v. Dolan*, 18 S. D. 558, 101 N. W. 712; *Ames v. Lamont*, 107 Wis. 531, 83 N. W. 780; *McArthur v. Slauson*, 53 Wis. 41, 9 N. W. 784; *Anderson v. Johnson*, 16 N. D. 174, 112 N. W. 139; *Milligan v. Ownes*, 123 Iowa, 285, 98 N. W. 792.

The term "purchaser" means one who buys the property offered for sale. The plaintiff furnished no purchaser for defendants' lands. *Snyder v. Hitt*, 2 Dana, 204; *Halbert v. McCulloch*, 3 Met. 456, 79 Am. Dec. 556; *Camden & T. R. Co. v. Adams*, 62 N. J. Eq. 656, 51 Atl. 26; *Eldridge v. Kuehl*, 27 Iowa, 173; *Curtis v. Burdick*, 48 Vt. 171.

It is not sufficient that the agent's or broker's acts are one of a chain of causes leading to the contract, as such acts must be the procuring or inducing causes, the causans. *Gilpin v. Davis*, 2 Bibb, 416; 5 Am. Dec. 622; *Ramsey v. West*, 31 Mo. App. 678; *Alden v. Earle*, 121 N. Y. 688, 24 N. E. 705; *Warren v. Cram*, 71 Mo. App. 638; *Garcelon v. Tibbetts*, 84 Me. 148, 24 Atl. 797; *Viaux v. Old South Society*, 133 Mass. 10; *Loud v. Hall*, 106 Mass. 407; *Tombs v. Alexander*, 101 Mass. 255, 3 Am. Rep. 349; *Kock v. Emmerling*, 22 How. 69, 16 L. ed. 292; *Glentworth v. Luther*, 21 Barb. 147; *Drury v. Newman*, 99 Mass. 256; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 378, 22 Am. Rep. 441; *Cook v. Welch*, 9 Allen, 350; *Rockwell v. Newton*, 44 Conn. 337; *Lunney v. Healey*, 56 Neb. 313, 44 L.R.A. 596, 76 N. W. 558.

The fact that the broker's efforts are instrumental in enabling the defendants to sell is not sufficient to satisfy the contract. *Charlton v. Wood*, 11 Heisk. 19; *Davis v. Gassette*, 30 Ill. App. 45 and cases cited; *Hoadley v. Savings Bank*, 44 L.R.A. 348, note; *Byers v. Williams*, 175 Mich. 385, 141 N. W. 571.

Plaintiff must have been the direct and procuring cause of the sale. *Murray v. Currie*, 7 Car. & P. 584, 2 Eng. Rul. Cas. 527; *Wilkinson v. Martin*, 8 Car. & P. 5, 2 Eng. Rul. Cas. 529; *Hungerford v. Hicks*, 39 Conn. 259; *Gillespie v. Wilder*, 99 Mass. 170; *Tombs v. Alexander*, 101 Mass. 255, 3 Am. Rep. 349; *Earp v. Cummins*, 54 Pa. 394, 93 Am. Dec. 718; *Lyon v. Mitchell*, 36 N. Y. 235, 93 Am. Dec. 502;

McClave v. Paine, 49 N. Y. 561, 10 Am. Rep. 431; Lloyd v. Matthews, 51 N. Y. 124; Chandler v. Sutton, 5 Daly, 112; Wylie v. Marine Nat. Bank, 61 N. Y. 415.

It clearly appears here that causes and information independent of any information furnished by plaintiff led up to and brought about the consummation of the sale by the defendants. *Armstrong v. Wann*, 29 Minn. 126, 12 N. W. 346; *Latshaw v. Moore*, 53 Kan. 234, 36 Pac. 343; *Studer v. Byson*, 92 Minn. 388, 100 N. W. 91; *Douville v. Comstock*, 110 Mich. 693, 69 N. W. 79; *Mechem, Agency*, § 966; *Kelso v. Woodruff*, 88 Mich. 303, 50 N. W. 249; *Wylie v. Marine Nat. Bank*, 61 N. Y. 415; *Sussdorff v. Schmidt*, 55 N. Y. 319; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 379, 38 Am. Rep. 441; *Dreyer v. Rauch*, 42 How. Pr. 22; *Thuner v. Kanter*, 102 Mich. 59, 60 N. W. 299.

If Schuyler was a purchaser, he was not ready, able, and willing to purchase upon the terms submitted to plaintiff by defendants. This is the whole test of liability. *Darrow v. Harlow*, 21 Wis. 303, 94 Am. Dec. 541; *Brown v. Shelton*, — Tex. Civ. App. —, 23 S. W. 483; *Warren v. Cram*, 71 Mo. App. 638; *Gleason v. Nelson*, 162 Mass. 245, 38 N. E. 497; *Murray v. Currie*, 7 Car. & P. 584, 2 Eng. Rul. Cas. 527; *Wilkinson v. Martin*, 8 Car. & P. 5, 2 Eng. Rul. Cas. 529; *Hungerford v. Hicks*, 39 Conn. 259; *Gillespie v. Wilder*, 99 Mass. 170; *Tombs v. Alexander*, 101 Mass. 255, 3 Am. Rep. 349; *Earp v. Cummins*, 54 Pa. 394, 93 Am. Dec. 718; *Lyon v. Mitchell*, 36 N. Y. 235, 93 Am. Dec. 502; *McClave v. Paine*, 49 N. Y. 561, 10 Am. Rep. 431; *Lloyd v. Matthews*, 51 N. Y. 124; *Chandler v. Sutton*, 5 Daly, 112; *Wylie v. Marine Nat. Bank*, 61 N. Y. 415; *Armstrong v. Wann*, 29 Minn. 126, 12 N. W. 346; *Anderson v. Johnson*, 16 N. D. 176, 112 N. W. 139; *Ball v. Dolan*, 18 S. D. 558, 101 N. W. 722.

The plaintiff not only failed to procure a buyer upon the terms of the contract, but the sale was made by defendants through other independent causes, and on wholly different terms. Therefore he is not entitled to recover. *Yoder v. White*, 75 Mo. App. 155; *Ramsey v. West*, 31 Mo. App. 676; *Zeidler v. Walker*, 41 Mo. App. 118; *Tooker v. Duckworth*, 107 Mo. 231, 80 S. W. 964; *Darrow v. Harlow*, 21 Wis. 303, 94 Am. Dec. 541; *Warren v. Cram*, 71 Mo. App. 638; *Clark v. Nessler*, 50 Ill. App. 550, and cases cited; *Davis v. Gassette*, 30 Ill. App. 45, and cases cited; *Hoadley v. Savings Bank*, 44 L.R.A. 348, note; *Hay v. Platt*, 66

Hun, 488, 44 L.R.A. 348, 21 N. Y. Supp. 362; Weber v. Clark, 24 Minn. 355.

Fowler & Green, for respondent.

"The motion at the close of a trial for a directed verdict is in the nature of a demurrer to the evidence, and all fair inferences from the evidence must be drawn in favor of the person against whom such verdict was directed, and where honest, intelligent men may fairly differ in their conclusions from the evidence, it is error to direct a verdict." John Miller Co. v. Klovstad, 14 N. D. 435, 105 N. W. 164; Higgs v. Minneapolis, St. P. & S. Ste. M. R. Co. 16 N. D. 446, 15 L.R.A. (N.S.) 1162, 114 N. W. 722, 15 Ann. Cas. 97; Hall v. Northern P. R. Co. 16 N. D. 60, 11 N. W. 609, 14 Ann. Cas. 960; Lowry v. Piper, 20 N. D. 637, 127 N. W. 1046; Houghton Implement Co. v. Vavrowski, 19 N. D. 594, 125 N. W. 1024.

There is no conclusive effect to be given to a letter written in the course of dealings between a principal and his agent as controlling the oral testimony and other written evidence. McLaughlin v. Wheeler, 1 S. D. 497, 47 N. W. 816; Lowry v. Piper, 20 N. D. 637, 127 N. W. 1046.

There is ample foundation in the record to uphold the instruction of the court to the effect that if, at the time of the sale, the agreement was upon a *quantum-meruit* basis, the plaintiff, if he was the procuring cause, could recover, and the verdict of the jury will be presumed to have been based upon that instruction and theory of the case. Reihus-Remer Land Co. v. Benner, 91 Minn. 401, 98 N. W. 186; Northern Immigration Asso. v. Alger, 27 N. D. 469, 147 N. W. 100, and cases cited; Wykoff v. Kerr, 24 S. D. 241, 123 N. W. 733; Ward v. McQueen, 13 N. D. 153, 100 N. W. 253; Wood v. Wells, 103 Mich. 320, 61 N. W. 503; Henninger v. Burch, 90 Minn. 43, 95 N. W. 578; Hubachek v. Hazzard, 83 Minn. 437, 86 N. W. 426; Hambleton v. Fort, 58 Neb. 282, 78 N. W. 498; Bowe v. Gage, 127 Wis. 245, 115 Am. St. Rep. 1010, 106 N. W. 1074.

There was no exception taken to the charge of the court on "procuring cause," and defendants cannot now complain. The instructions of the court are correct. 23 Cyc. 452; Langford v. Issenhuth, 28 S. D. 451, 134 N. W. 889; Smith v. McGovern, 65 N. Y. 574.

"A real estate broker who procures a purchaser for realty and brings

the parties together is entitled to his commissions, although the sale is consummated by another broker on different terms. *Wood v. Wells*, 103 Mich. 320, 61 N. W. 503; *Hambleton v. Fort*, 58 Neb. 282, 78 N. W. 498; *Anderson v. Cox*, 16 Neb. 10, 20 N. W. 10; *Hubachek v. Hazzard*, 83 Minn. 437, 86 N. W. 426; *Wykoff v. Kerr*, 24 S. D. 241, 123 N. W. 733; *Boyd v. Watson*, 101 Iowa, 214, 70 N. W. 120; *Myers v. Moore*, 85 Neb. 715, 124 N. W. 157; *Elwood-Emerson Land Co. v. Bleasdale*, — Iowa, —, 139 N. W. 554; *Rounds v. Allee*, 116 Iowa, 345, 89 N. W. 1098; *Henninger v. Burch*, 90 Minn. 43, 95 N. W. 578; *Kelso v. Woodruff*, 88 Mich. 299, 50 N. W. 249; *St. Felix v. Green*, 34 Neb. 800, 52 N. W. 821; *Humphrey v. Eddy Transp. Co.* 115 Mich. 420, 73 N. W. 422.

The charge of the court being "that if you find by a fair preponderance of the evidence that the contract was as plaintiff claims, then a 'procuring cause' means the original discovery of the purchaser by the broker and the starting of negotiations by him, together with the final closing by or on behalf of his client, with the purchaser," no objection or exception to such charge was made by either party. *Smith v. McGovern*, 65 N. Y. 574; *Langford v. Issenhuth*, 28 S. D. 451, 134 N. W. 893.

The court's charge must be read and considered as a whole. *Stoll v. Davis*, 26 N. D. 373, 144 N. W. 443.

BRUCE, J. This is an action to recover 50 cents an acre, which it is claimed is the reasonable value of services rendered in selling 3,456.75 acres of land for and on behalf of the defendants, *Holmes and Bakke*. The court refused a motion to direct a verdict for the defendants, and the defendants now appeal from a judgment rendered on the verdict of the jury.

The complaint alleges "that the plaintiff was employed by said defendants to aid them in and about their business of selling lands, and to find and bring purchasers for lands owned by said defendants, and which said defendants otherwise had for sale upon a commission which defendants promised to pay this plaintiff," and "that during the time when plaintiff was employed as aforesaid by said defendants, he found and furnished *as customers* for the purchase of land from said defendants one Clarence C. Schuyler and one Alex. Stern, that the defendants,

with the aid and assistance of this plaintiff, sold and procured to be conveyed to said Alex. Stern three thousand four hundred and fifty-six and 75/100 acres (3,456.75 acres) of land in the counties of Becker, Clearwater, and Mahnomen, in the state of Minnesota; and the transactions concerning said sale were had by plaintiff with said Alex. Stern, through said Clarence C. Schuyler, said Schuyler acting for said Stern," and "that plaintiff's services in and about the making of the sale aforesaid were reasonably worth, and the reasonable commission upon said sale for the services rendered by this plaintiff is, the sum of 50 cents per acre and the aggregate amount of one thousand seven hundred and twenty-eight and 37/100 dollars (\$1,728.37)," and "that no part of said commission has been paid by said defendants."

The contention of the plaintiff and respondent is that he was employed by the appellants to procure purchasers for them, and was to be paid a reasonable commission for furnishing such purchasers; that he was to have nothing to do with fixing prices or terms or with closing deals, but was simply to procure purchasers; that he did procure purchasers in the persons of Stern, or Schuyler and Stern, and that appellants closed a deal for the sale of 3,456 acres of land, and that plaintiff was therefore entitled to a reasonable commission, which he alleges to be 50 cents an acre.

Appellants, on the other hand, contend that there was an express contract of agency between the parties whereby the plaintiff was to sell the land at a price which should net to the defendants a certain sum, and that he was to obtain his commission, if at all, from what he got in excess of that price, and further that respondent did not as a matter of fact procure any purchasers at all.

It is clear from the record which is before us that, if the plaintiff is entitled to recover anything at all, it must be upon the *quantum meruit*, and it is first claimed by the appellants that no such action is set forth in the complaint. In this contention, however, counsel is in error.

"Assumpsit on a *quantum meruit*," says Mr. Phillips in § 97 of his work on Code Pleading, "lies for work done at the request of another. It differs from *indebitatus assumpsit* in this, that instead of alleging a promise to pay a certain sum specified, the plaintiff alleges first the doing of the work, and then a promise to pay as much as he reasonably

deserved, and that for the work he reasonably deserves to have a specified sum." Pomeroy holds that the implied promise need not be pleaded, but may be inferred from the facts stated. This is our holding. Pomeroy, Code Rem. 3d ed. §§ 537 to 541.

The complaint meets the latter's test.

Even if it does not technically do so, it was upon this theory that the case was tried, and any ambiguity must be resolved in favor of the verdict.

But was there any evidence of services rendered by and at the request of the defendants, the compensation for which was not already provided for and covered by some special contract?

We think there was. Special contracts there had been, it is true, in the past, but as we view the evidence the transaction before us was outside of and independent of them. The plaintiff had for some time been acting as the selling agent of the defendants. During this time he had been given various lists of lands, and accompanying these lists were letters stating that his commission was to be deducted from the selling price, a net price to the defendants being provided for. In the particular transaction before us, however, the plaintiff had been unable to effect a sale at the list prices, and of the land alone which had been listed with him. He had been repeatedly urged, however, to use his best endeavors. He had therefore inserted an advertisement in the paper asking for a purchaser for the lands which he controlled, and which were only 2,500 acres. In response to this advertisement a man by the name of Schuyler called upon him and told him that he had several parties in mind who wanted to buy; that he wanted to get hold of some lands, cheap lands; that he had several clients in mind *and would place his time against their money* in the purchase. The plaintiff then gave to Schuyler a description of the lands listed with him, and told Schuyler that he thought Bakke had other lands at a cheaper figure, but wasn't sure. Schuyler then said that he would want more than the plaintiff had in that 2,500 acre tract, wanted more land than that, perhaps 4,000 acres, and asked the plaintiff if he could get a cheaper figure than the list price of \$7.50. Plaintiff then answered that he could not give him that, but Bakke might be able to give him a better figure, and that he would phone Bakke. This plaintiff did on the next day or so, and told Bakke that he had a client for the purchase of these lands,

that it looked good to him, and that if Bakke had time he would like him to run up and meet Schuyler. Later and a short time afterwards Bakke came to Fargo, and *plaintiff took him over to see Schuyler*, and Schuyler went over in a general way with Bakke the conversation he had had formerly with plaintiff, and after this conversation Bakke was enthusiastic and said that he thought he had a sale effected through Schuyler. This conversation was in December, 1911. After this meeting plaintiff had several talks with Bakke over the telephone, and on these occasions Bakke kept asking him how this sale to Schuyler was progressing, and plaintiff told him that it was hard to effect a sale on account of the fact that the pieces were so separated, and asked Bakke for a descriptive write-up of each piece of land. Bakke, however, told him he could not do this. On January 17th, 1912, the plaintiff wrote Bakke as follows: "I have been talking with Mr. Schuyler to-day and he wants a price on all the land you have there and would like more than 2,500 acres. Kindly call me up by 'phone to-morrow, or advise me as soon as you can, the best price you can put on the whole tract, and also send me revised lists. He has a fellow who will put in at least \$5,000 cash, and is in a position to do business right away. He will be in to-morrow or the next day to see about it. This looks like business." On January 23d, 1912, he again wrote: "I wish you would kindly send me soon as possible a little descriptive write-up on each of the pieces for that first list. The \$6 land you can just give me a general description of. Mr. Schuyler asked me for this as his client has made this demand. It sounds like business if we can arouse enough interest by giving him proper details. He does not want to see the land, but wants to know just what he is getting." On February the first he wrote: "I received your favor of January 31st in regard to the \$6 land and one trouble with the descriptions, John, is that they are too general. The people we are negotiating with now would like a description of each piece, and it would seem to me that if you could only fix up a deal and number the piece and give a little description, even if it is general about each one, it would have a lot of effect. This Schuyler client is just such a fellow, and he demands such a write-up about each piece." On February 2d, Bakke wrote the plaintiff, Farmer, as follows: "As to writing up a description of every piece of land, that is impossible. It would take a man several weeks to locate all of the pieces and examine them.

It would cost too much money. If Schuyler wants to pick out a few pieces out of the list, we can show him them." On February 10th, Bakke again wrote Farmer as follows: "I am sending you a map of Becker county and one of the reservation. I am loaning this map to Schuyler. *Please take it over to him.* You and I can afford to sit up nights, if necessary, and figure out a deal whereby we can sell this tract to Schuyler." It would appear, however, that this statement as to sitting up nights was in reference to a list on \$6 lands and in case of the sale of which the plaintiff, in a former letter, had agreed to divide the commission, first giving each party a dollar an acre, for on January 31, 1912, Bakke wrote Farmer: "In regard to the list of \$6 land that I sent you a description of, I do not mind telling you that the price I have made on this and to the owner is \$4 per acre, and if you can find a buyer at \$6 an acre it will give us a dollar apiece. The other tracts that we are holding at \$7 are away ahead of the \$6 land. I hope you can make a deal on a part or all of this. *If you have any prospects of sale, I will be glad to run up to Fargo and help you close the deal. Keep after him as hard as you can while he is in the notion.* Please take the map over to him. Have you the complete list of these lands?" On February 13, 1912, Bakke wrote Farmer asking for Schuyler's initials. On February 26th, he wrote Farmer: "*What about the deal for the 4,000 acres with Schuyler?*" On February 27th, he wrote: "*Please see Mr. Schuyler again and see if there is any prospect of making any deal with him. If not, I have one or two other parties interested and will try and make a deal with them, but I want to give Mr. Schuyler first chance.*" On February 28, 1912, the plaintiff, Farmer, wrote Bakke: "Your favor of February 27 at hand as to Mr. Schuyler. He says that he has had an answer from his client and he has figured on going down to Detroit and see some of the land, but did not think it advisable to go at this time. He still has the deal on tap and hopes to be able to see some of the pieces so that he can give a satisfactory answer to his client." On March 30, 1912, Bakke wrote Farmer: "What about the land you were going to sell to Schuyler and others?"

On the 11th day of June, 1912, the contract of sale was made by the defendants personally, the plaintiff not being present. The contract was in part as follows: "This agreement made and entered into

this 11th day of June, A. D. 1912, by and between C. D. Holmes and J. E. Bakke of the county of Becker, state of Minnesota, parties of the first part, and Alex. Stern of the city of Fargo, state of North Dakota, party of the second part. . . . Witnesses that the said parties of the first part hereby sell and agree to convey to the said party of the second part 3,500 acres of said above-described lands for the sum of \$5 an acre, payable in the manner and upon the terms as hereinafter set forth, . . . and agrees to pay therefor the said sum of \$5 per acre."

On the 12th day of June, 1912, the plaintiff, Farmer, wrote Bakke as follows: "I have just been advised that a sale has been made through Mr. Schuyler of Fargo, who is our customer. Our information came through Mr. Stern, and if a sale is effected, of course we will expect a division of the commission. I talked with Mr. Schuyler over the 'phone just now and he states that he secured a different price from you, but in all your letters to me you advised me that it would be well to keep after Mr. Schuyler. We feel that Mr. R. J. Wilson and myself are entitled to some consideration in a case a settlement is effected. Kindly let me hear from you."

On June 18, 1912, Farmer wrote Bakke as follows: "I was up to see Schuyler to-day, while I had this matter in mind, and we went over the whole proposition, and he does not in any way deny to me any particular of the testimony which I placed before you yesterday. He did qualify his statement when I brought it to his attention that he had asked you or Mr. Holmes when down there how the deal affected the Fargo parties, by stating that it may have been a conversation he had with you over the 'phone, but he had always had in mind a consideration for us. He further states that your contention that he was to pay me a commission is entirely at variance with the facts. He bears out my testimony exactly that we never even discussed the matter of a commission. He also confirms my recollection of the first conversation I had with him, which is along the following lines: He knew that the land was listed with me for \$7.50 per acre, a 2,458-acre tract, he making the statement that he assumed that the 50 cents was my commission. He further stated that, of course, he had no money, and if a deal was made with the St. Paul parties, would I divide with him the 50 cents, so that the land would be at net \$7? I did not reply to that statement. He also asked me if I thought he could get the land cheaper, and then

I told him he had better get on the train and go down and see you, which he did. He further bore out my version of the whole matter by stating he had asked me whether he could get more than 2,500 acres, stating that he would need about 4,000 acres. I then wrote you for the list and you sent me the 5,000-acre bunch, advising me that it cost you \$4 and that if I sold it for \$6, we would make \$1 an acre apiece. He further stated that in this last deal he told you he did not think he could handle the \$7.50 land and asked you for 3,500 acres at your cheapest possible figure, and you finally made a selling price to him of \$5. He stated that you did not think you could complete the 3,500-acre list at first, but finally came through. He finally concludes his whole testimony by stating that he could not possibly deny that I am responsible for the deal. I can hardly yet figure out your contention or that of Mr. Holmes. All I want is a fair shake, and if I get that, I am willing to let by-gones be by-gones. I have gone over these particulars as they have occurred to me and Mr. Schuyler, and I am jotting them down before they become cold."

On the 8th day of July, 1912, Bakke wrote Farmer as follows: "*We have not yet closed up the deal between Schuyler and Stern.*" On July 9, 1912, Farmer wrote Bakke: "Your favor of July 8th at hand advising me that the deal between you and Messrs. Schuyler and Stern of Fargo has not been closed."

In addition to these letters the plaintiff testified as follows:

Q. You heard Bakke's testimony that after this first talk that you and he had in July in Detroit, that he talked with you several times at Fargo in which the matter of a net price of lands was discussed?

A. Yes, sir; I heard that testimony.

Q. Did you have some talks with him?

A. We had some conversation, but we never discussed the commission matter at all.

Q. What was this conversation?

A. Bakke told me very plainly that he wanted me to get a purchaser for these lands; he urged me to do and wanted me in every conversation to get a purchaser; they wanted to make a sale of this property.

Q. Say what?

A. He said the land was costing a lot of money to carry and he had

to get rid of it, he and Holmes, and he says: "If you get us a purchaser to deal for these lands and bring him down, then we will show him the land, close the deal, and do what is right by you;" that is just the conversation.

He also testified upon cross-examination as follows:

Q. This is the first time in this case that you made this statement that Bakke ever said to you he would do what is right with you?

A. Yes, sir; it is the first time.

Q. You didn't testify to it in your direct examination?

A. No, sir; it wasn't brought out.

Q. Is there a letter in all your correspondence, either introduced in the evidence or not introduced, wherein such a statement is contained?

A. The Hartman letter; yes, sir.

Q. The Hartman deal didn't go through?

A. No.

Q. That is the only one in which there is any such statement?

A. I can't recall that.

Q. You don't remember any other statement?

A. I know that statement was made several times by Bakke, to me, in several ways.

Q. This is the first time you have told us about it?

A. The first time it was brought up; yes.

Farmer also explained his prior testimony relative to the first list of lands given to him and as to the commission of 50 cents per acre, as follows:

Q. You did testify that at the beginning of the arrangements at Detroit that you were to take the \$7 land and your commission would be 50 cents?

A. This all had reference to the \$7 land.

Q. You testified with reference to the first conversation you were to sell it at \$7 net and get 50 cents?

A. That was the first list submitted.

Q. You did have that arrangement then?

A. Yes, sir.

Q. And attempted to make sales under that?

A. Yes, sir; and made one sale under that.

Q. And get your commission?

A. The land sold to Walter Thompson, for instance, there is a case there, that was a part of the \$7 list; but I didn't get everything over and above \$7 per acre for that; the land was sold for \$20 an acre and they fixed the terms.

Q. You got your 50 cents commission?

A. Yes; but I didn't get everything over and above \$7.

Q. You agreed to take 50 cents commission on that?

A. They fixed the terms themselves.

Q. You got your 50 cents?

A. I asked them if that would be acceptable, and they said yes; they fixed the terms and gave me \$50 instead of 50 cents an acre.

Q. They gave you more than they contracted to give you?

A. No more than they contracted; if they gave everything they contracted for they would give everything above \$7.

He also testified that shortly after July 8th, 1912, Bakke called at his office, and in the conversation stated that he intended to make him a proposition after the deal was all closed, though this was after a claim had been made for the commission and after a covert threat conveyed by the words, "How would you like a suit?"

We are not called upon on this appeal to pass upon the credibility of the witnesses. That was for the jury. All we are called upon to decide is whether there was sufficient evidence to go to that jury of an implied contract to pay a reasonable commission, which would be the basis of an action on the *quantum meruit*.

The question is simply this: If a landowner sends to an agent various lists of land at a certain net price, and the agent interests a prospective purchaser and such purchaser refuses to pay the list price, and wants more land than that offered, and is referred by the agent to the principal to see if he can make a deal with him, and the principal keeps on dealing with the prospective purchaser, both by himself and through the agent, and urges the agent to continue using his influence with the purchaser, and afterwards the principal meets with the purchaser alone and effects a sale for less than the list price and for more land than was actually listed, but yet contemplated in the transactions between

the principal and the agent, whether such agent can recover on the *quantum meruit* a reasonable commission on such sale for his services performed. We think he can.

We have carefully examined the cases which are cited by the appellant, but are not convinced thereby. In the cases of Byers v. Williams, 175 Mich. 385, 141 N. W. 571; Armstrong v. Wann, 29 Minn. 126, 12 N. W. 345; Latshaw v. Moore, 53 Kan. 234, 36 Pac. 342; Studer v. Byson, 92 Minn. 388, 100 N. W. 90; Douville v. Comstock, 110 Mich. 693, 69 N. W. 81; Tooker v. Duckworth, 107 Mo. App. 231, 80 S. W. 963; Warren v. Cram, 71 Mo. App. 638; Hay v. Platt, 66 Hun, 488, 21 N. Y. Supp. 362; Wylie v. Marine Nat. Bank, 61 N. Y. 415; Thuner v. Kanter, 102 Mich. 59, 60 N. W. 299; Clark v. Nessler, 50 Ill. App. 550; Davis v. Gassette, 30 Ill. App. 414,—not only was the broker clearly not the procuring cause of the sale, but all the actions were brought on express contracts for commissions, and not on the *quantum meruit*.

The case of Darrow v. Harlow, 21 Wis. 302, 94 Am. Dec. 541, is clearly not in point, as it merely involves a transaction in which a commission to sell had been given to an agent which was not exclusive, and where the principal himself sold the property to a third person prior to the sale which was made by the agent. Suit, too, was on the fixed commission contracted for.

The case of Davis v. Gassette, 30 Ill. App. 41, is in favor of plaintiff's contention rather than against it. The court in its opinion saying: "It is in our opinion very clear upon the whole record that appellee did not earn commissions by the performance of his contract. His agency was to sell the property at a specified sum. It would be absurd to say that he could earn his commissions by bringing to his principal a customer with a mere offer to trade for the property. It is true that if Pardridge, when he went to look at the property at appellee's instance, had offered to trade with the appellant, and an exchange was brought about between them by negotiations instituted by the efforts of appellee, he would have a claim for his commissions founded on a basis of justice, *for the parties were brought into communication through his agency, and the principal having the power to negotiate with the purchaser on different terms, his doing so would be a waiver of the terms given to the agent. In such case the endeavor of the agent would be the efficient cause*

of *procuring the transaction*. But the evidence in this record shows no such case. Here, a year before the trade was made, Pardridge had absolutely declined to have anything to do with the property on the terms on which appellee was authorized to offer it, and *no negotiations of any kind between appellant and Pardridge resulted from the meeting brought about by appellee*. At that time trading does not seem to have entered the thoughts of either party. The exchange of properties was brought about a year later by *another broker*, who got the parties together on a proposition to trade appellant's property instead of to sell it."

The facts in the case of *Weber v. Clark*, 24 Minn. 354, are so limited that we are not sure that the case is in point; anyway the rule announced is so inequitable that we decline to follow it. We presume that the action was brought, however, on the contract rather than on the *quantum meruit*, and that therefore the case is not in point.

The case of *Putnam v. How*, 39 Minn. 363, 40 N. W. 259, would be in point if it were not for the fact that, after the first visit of the purchaser to the agent and his reference to the principal, the agent did nothing more, and was asked to do nothing more, in the transaction. The agent, in short, was not strictly the procuring cause of the future transaction, nor was the suit brought on the *quantum meruit*.

In the case of *Zeimer v. Antisell*, 75 Cal. 509, 17 Pac. 642, the authority of the agent was expressly limited to a certain time, and the sale was not made by the principal until after that time and the matter had been taken entirely out of the agent's hands.

In the case of *Trickey v. Crowe*, 8 Ariz. 176, 71 Pac. 967, the owner, who had given the commission contract, died, and subsequently the administrator of the estate sold to the prospective purchaser for the price previously agreed upon but on different terms. The case is decided largely on the theory that the death of the owner terminated the agency, and that the contract of the administrator was a new contract.

In the case of *Kane v. Sherman*, 21 N. D. 249, 130 N. W. 222, there appears to have been no sale at all, and this court held that there was no evidence of any agreement to sell or any authorization to the agent to sell.

In the case of *De Zavala v. Royaliner*, 84 N. Y. Supp. 969, the purchaser brought by the broker failed to agree upon terms, and the sale

was consummated, not through the plaintiff, but through an entirely different broker.

The case of *Bunks v. Pierce*, 33 Colo. 440, 80 Pac. 1036, is clearly not in point.

In the case of *Frenzer v. Lee*, 3 Neb. (Unof.) 69, 90 N. W. 914, the broker's authority had been ended. He had nothing to do with the subsequent transaction, and in the subsequent transaction only a portion of the property was sold. The same is true of *Dillard v. Field*, 168 Mo. App. 206, 153 S. W. 532.

We are satisfied, indeed, that in a case such as that which is before us, and where, if the evidence of the plaintiff is to be believed, there can be no question that the plaintiff, Farmer, was the procuring cause of the sale, that that plaintiff is entitled to the reasonable value of his services in an action on the *quantum meruit*. It is true that the land was not sold at the list prices. It is no doubt the fact that such prices could not be obtained, and that the purchaser wanted other lands in addition to those covered by the lists. It is also the fact, however, that in spite of this the defendants urged the plaintiff to continue his efforts, and himself, during such acting, consummated the sale at a lower figure. The plaintiff in short furnished a buyer or buyers upon terms which, even if not originally contemplated, were satisfactory to his clients, and he is certainly entitled to the reasonable value of his services.

Nor do we believe there is any merit in the contention that different land was sold than that originally spoken of and that a house was traded in as part of the transaction. It is clear, indeed, at any rate from the testimony of the plaintiff, that the obtaining of other lands than those listed was contemplated, and it was partly because more land than the 2,500 acres first listed was desired that the matter was referred to Bakke. After this reference Bakke told the plaintiff to keep at the matter, which in itself was a recognition of his continued agency. As far as the throwing in of the house was concerned, that was the defendants' business, and did not affect the matter any more than would a reduction in price, and where the agreement is (and there is evidence which tends to show this) that the agent shall merely furnish a buyer on terms acceptable to his principal, the terms agreed upon must be deemed acceptable.

There was, indeed, to our minds, evidence to go to the jury on the

question whether the plaintiff was the procuring cause of the transaction which was actually consummated, and the question as a whole was one for the jury, and not for the court, to pass upon. *Elwood-Emerson Land Co. v. Bleasdale*, — Iowa, —, 139 N. W. 554; *Smith v. McGovern*, 65 N. Y. 574.

Nor do we believe that there is any merit in the contention that, "if Schuyler was a purchaser, he was not ready, able, and willing to purchase upon the terms submitted to plaintiff by defendants, and that plaintiff never produced any purchaser willing to deal upon the terms fixed by the defendants, and the final sale was entirely different and included other properties and was made upon different terms and conditions from those upon which the plaintiff was to furnish a purchaser." It is perfectly true that not more than 2,500 acres of the land that was originally listed was sold, and possibly only 1,500 acres, and that Schuyler probably never furnished any part of the purchase price. It is clear from the testimony of the plaintiff, however (and the jury could believe this or not as they chose), that Schuyler never pretended to be the actual purchaser, but was merely to furnish his time while the actual purchaser furnished the money. The important thing, indeed, was to find a buyer, and if the plaintiff did this it was immaterial whether an intermediary was used or not. *Kelso v. Woodruff*, 88 Mich. 299, 50 N. W. 249; *St. Felix v. Green*, 34 Neb. 800, 52 N. W. 821.

All that the complaint alleges, indeed, is that "the plaintiff found and furnished, as customers, one Clarence C. Schuyler and one Alex. Stern, that defendants with the aid and assistance of this plaintiff sold and procured to be conveyed to said Alex. Stern 3,456 acres of land, that the transactions concerning said sale were had by plaintiff with said Alex. Stern through said Clarence C. Schuyler, said Schuyler acting for said Stern."

This the evidence of plaintiff tended to show, and this was sufficient.

The sale as consummated, it is true, was not such as was originally contemplated by the parties, but that the plaintiff was its procuring cause was settled by the verdict of the jury, and he is therefore, entitled to compensation. 31 Cyc. 1516; *Ward v. McQueen*, 13 N. D. 153, 100 N. W. 253.

It is urged, however, that the verdict and judgment is upon the theory

of a *quantum meruit*, and is at variance with the proof of the case, which is purely proof of an express contract. We do not, however, so read the record. Even if there was an express contract, however, the evidence, to our minds, tends to show that the parties were brought together by the plaintiff, and that the variance from that contract was brought about by the defendant making his own personal settlement, and it would seem that even upon this theory the jury were justified in rendering the verdict they did, as all of the contracts contemplated at least 50 cents an acre commission, and though this was conditioned upon selling at a fixed price, if the defendant chose to sell it himself for a lesser sum, still, since he used the agency of the plaintiff to keep him and his purchaser together, he would be none the less liable.

It is next urged that the trial court erred in the matter of the admission and exclusion of evidence. One of the facts which would influence us in coming to a conclusion in the case, and that adverse to the interests of the defendants, is, that the plaintiff, Farmer, testified that after the contract for the sale of the property to Alex. Stern he had a conversation with Bakke in which he asked Bakke why he had not considered him in connection with the deal, and that Bakke told him that he did not consider it necessary, as he never had any idea that the deal would be closed, and that he, Bakke, said that he "had a consideration with me (Farmer), and intended to make me a proposition after the deal was all closed." This evidence was competent, not in the theory of a settlement (for none was pleaded), but as an admission on the part of the defendant and as proof of a recognition of the agency of the plaintiff in the bringing about of the deal in question. It is claimed, however, that the examination of the defendant Holmes as to this testimony was unduly limited, and that on such examination the defendant was not permitted to testify as to a later meeting and conversation, the defendants' counsel urging that "Farmer testified that they said we will make you a proposition later and I am trying to find out what that conversation was later, and why it was made."

We are of the opinion, however, that reversible error was not committed in this matter. The court held merely that the examination should be limited to the particular conversation testified to by the plaintiff. This conversation was held prior to the final closing of the deal, while the future conversation was held after it had been closed,

and some three weeks later. No offer of proof was made, and we are unable to see from the record that any prejudice was occasioned. It is now the well-established law in this jurisdiction that "a party must offer to prove the facts sought to be elicited before he can assign error upon an objection sustained to a question to a witness, the competency of which is not apparent on its face." *Halley v. Folsom*, 1 N. D. 325, 48 N. W. 219; *Mordhorst v. Nebraska Teleph. Co.* 28 Neb. 610, 44 N. W. 469.

So, too, it would seem from the record that later in the same examination the trial court changed its ruling and the defendant was given the opportunity to introduce all of the testimony that it desired in relation to this later meeting.

It is next urged that the court erred in allowing the witness, Schuyler, to testify concerning his conversation with the purchaser, Stern, as to the interest he and Stern should have in the land sought to be purchased.

It is not necessary for us, however, to determine whether under ordinary circumstances the hearsay rule would be violated by the admission of such testimony. It is sufficient to say that even if the conversations were not admissible and were hearsay and not binding on the defendants, their only effect could have been to show that Schuyler was a joint purchaser with Stern, and, as we have before stated, it is immaterial to a recovery in this case whether Schuyler was a joint purchaser or merely an agent.

The defendants further complain of the charge of the court on the subject of who is and who is not the procuring cause of a sale. The only exception taken was to the court's action on a request for an instruction which was submitted by the plaintiff. This request was marked "refused but given in substance," and no exception seems to have been taken to the charge which was actually given. But even that charge was, to our minds and under the facts of the case, correct.

The court instructed the jury that "the words, procuring cause, have been used in this charge. What they mean as applied to this case is: If you find from a fair preponderance of the evidence *that the contract was as plaintiff claims*, then a procuring cause means the original discovery of the purchaser by the broker and the starting of the negotiations by him together with the final closing by or on behalf of his client

with the purchaser; and in this behalf I call your attention to what I have already said as to how you will determine whether Mr. Stern was or was not a purchaser furnished by plaintiff."

The prior instruction referred to was as follows: "A deep-seated controversy appears upon the question of whether Mr. Stern was produced by Mr. Farmer, the plaintiff in this action. In that behalf I charge you, gentlemen of the jury, that you are to consider all the circumstances, and discover whether the plaintiff was in truth and in fact the procuring cause of the Stern Brothers purchasing the land in question. The testimony revolves around the securing of these gentlemen through Mr. Schuyler. I think it wholly immaterial whether Mr. Schuyler and Mr. Stern were in partnership, or whether they were not, provided you further find that as a continuous transaction between Mr. Farmer and Mr. Schuyler, and as a part of and in compliance with any contract which you shall find existed between the plaintiff and the defendants, plaintiff was the procuring cause, either directly or indirectly through Mr. Schuyler, inducing Stern to make the purchase which it is conceded that they did make. If you should find that the deal with Mr. Stern was not a part of the transaction between Mr. Farmer and Mr. Schuyler, then your verdict would be for the defendants; and as I have before said, the question with reference to this branch of the case must rest wholly upon the other question: Did the acts of Mr. Farmer, as defendants' agent or broker, result, actually and continuously, in the securing Mr. Stern, and thus become the procuring cause in inducing Mr. Stern, to buy the land in question?"

We can find no error in the instruction given. It was approved in the cases of *Smith v. McGovern*, 65 N. Y. 574, and *Langford v. Issenhuth*, 28 S. D. 451, 134 N. W. 893, and under the facts of the case is approved in the action which is before us.

We find no error in the remaining instruction complained of, nor in the refusal of those asked by the defendant. We find it unnecessary to discuss these instructions specifically, as the legal questions involved have been already discussed by us.

The judgment of the District Court is affirmed.

O. SKOGNESS v. D. D. SEGER.

(180 N. W. 508.)

Goods sold — action to recover price — proof — burden of — contract of sale — validity — existence — terms — price or value — delivery — acceptance — compliance with contract — waiver.

In actions to recover the price or value of goods sold the burden is on plaintiff to prove the existence and validity of the contract of sale, and the terms thereof, the price or value, the delivery and acceptance, of the goods, and the amount thereof, and his compliance with the contract, or a waiver of its provision by the buyer, and he has also the burden of proving that goods delivered or tendered complied with the contract.

Opinion filed November 28, 1916.

Appeal from the District Court of Cass County, *Pollock, J.*

From a judgment and an order denying a motion for judgment notwithstanding the verdict or for a new trial, plaintiff appeals.

Affirmed.

J. E. Hendrickson, for appellant.

A sale of personal property followed by actual delivery cannot be rescinded unless the property be promptly returned to the seller, or its return tendered and refused. *Houghton Implement Co. v. Vavrosky*, 15 N. D. 308, 109 N. W. 1024.

Where defendant gives notice that he refuses to perform his part of the contract, the plaintiff is at liberty to enforce the obligation against defendant, whether plaintiff has performed or not. A verdict should therefore have been directed for plaintiff. *Comp. Laws 1913, § 5775.*

Title to personal property passes from the seller to the buyer upon delivery to the carrier free on board. *J. L. Owens Co. v. Doughty*, 16 N. D. 10, 110 N. W. 78; *Smith v. Edwards*, 29 Hun, 493; *King v. Cleveland Ship Bldg. Co.* 50 Ohio St. 320, 34 N. E. 436; *Dentzel v. Island Park Asso.* 229 Pa. 403, 33 L.R.A.(N.S.) 54, 78 Atl. 935.

Robinson & Lemke, for respondent.

The pleadings and evidence show merely an executory contract for the sale of personal property which the plaintiff never delivered and which the defendant never received or accepted; hence no title passed

to defendant. Comp. Laws 1913, § 5536; Badger State Lumber Co. v. G. W. Jones Lumber Co. 140 Wis. 73, 121 N. W. 933; J. B. Bradford Piano Co. v. Hacker, 162 Wis. 335, 156 N. W. 141.

CHRISTIANSON, J. This suit was originally commenced before H. F. Miller, a justice of the peace in Cass county, and resulted in a judgment in favor of the plaintiff. Defendant appealed from the judgment of the justice of the peace to the district court, and the cause was subsequently tried to a jury in the district court of Cass county and resulted in a verdict in favor of the defendant. The plaintiff appeals from the judgment entered pursuant to the verdict and from the order denying his motion for judgment notwithstanding the verdict or for a new trial.

The plaintiff's complaint alleges that in May, 1915, the defendant gave plaintiff a written order for marble posts, iron piping, chains, hooks, etc., to fence a certain cemetery lot 9x18 feet, and that pursuant to such contract the plaintiff shipped the material so ordered to the defendant at Leonard, North Dakota, and that "the defendant has at all times neglected and refused, and still does fail, neglect, and refuse, to accept and receive said fencing." The defendant as an affirmative defense avers in his answer that on May 1, 1915, the plaintiff offered and agreed to furnish the defendant material to fence a certain cemetery lot 9x18 feet and deliver the same within a reasonable time to the defendant at Leonard, North Dakota. The material to consist of six light blue marble posts 5 feet long with holes 6 inches from the top to admit the insertion of a 2-inch pipe sufficient to go around the lot and to connect the posts with the holes in the iron pipe, for twelve or more iron hooks to sustain an ornamental chain suspended below the iron pipes. That the plaintiff has never offered to deliver such material or any similar material, excepting white marble posts with holes for 1½ inch pipe, and with hooks for the iron pipe which were too large for the same and for the ornamental chain. That defendant could not use it and did not order it, or agree to pay for it.

The evidence shows that the plaintiff and defendant had a certain conversation regarding the fence in question, and that subsequently, on April 30, 1915, the plaintiff wrote the defendant the following letter:

"I have this evening looked up the prices on fences and I can furnish you with a fence 6 posts 5 feet high and 6 inches square in marble and

chains and pipes for the lot for \$75 and the same fence in granite for \$95. The marble posts come in light blue and are most generally used in fences where chains and pipes are used. The granite posts come higher as they are harder to work down smooth. If you should decide to get a fence I shall be glad to hear from you."

Defendant thereafter replied thereto as follows: "Leonard, May 5. If you accept my offer try and get them here before Decoration Day. If you like you can send me the fencing for my lot, which is 8 by 18 feet, 6 marble posts 6 by 6 inches square, 5 feet length, *light blue* galvanized pipe, 1½ inch chains and tassels. Fencing all complete. Delivered at Leonard f. o. b. for \$75, payable six months. Pipe about 4 inches from top of post. Chain sag between post 8 inches, not over ten."

It is undisputed that the contract or order for the material involved in this controversy is evidenced solely by these two letters. The plaintiff subsequently shipped certain fencing to the defendant, and on July 19, 1915, the defendant wrote the plaintiff as follows: "I am sorry to tell you that only part of the fencing has come yet, and what is here is not what I expected to see according to my order. I am very much disappointed, do not like it one bit. Now what is to be done about it?"

And on July 29, 1915, the defendant sent the plaintiff the following letter: "I was to Leonard station and examined the fencing I ordered from you, and it is not what I ordered, by far, and I will not accept it."

The plaintiff testifies that upon receiving the letters from the defendant, he went to Leonard, where he met the defendant at the station, and that they together examined the different parts of the fencing and found that the hooks were too large, and that the plaintiff thereupon went to a blacksmith at Leonard and ordered different hooks, but that the defendant then and there "refused me to take the fence out and set it up."

Upon the trial in the district court, the defendant brought into court and introduced in evidence one of the marble posts, one of the galvanized pipes, and some of the hooks, and these were offered and received in evidence and considered by the jury, and while these exhibits are referred to in the court's certificate settling the statement of case, they have not been forwarded to this court, and consequently cannot be examined by us. The plaintiff in his testimony contended that the

posts really complied with the terms of the order and were light blue marble posts, whereas the defendant, on the contrary, contended that they were not light blue, but were white, and to substantiate his testimony produced and offered in evidence one of the posts. There was also testimony on the part of the defendant tending to show that the pipes did not fit, and that certain parts of the material had never been shipped. It was conceded that the hooks sent by the plaintiff were too large and could not be used, and while the plaintiff directed a blacksmith at Leonard to prepare other hooks, it is admitted that plaintiff subsequently, upon defendant's refusal to accept the fence, notified the blacksmith not to make such hooks.

Upon the issues as thus framed under the pleadings and the proof, the court submitted the cause to the jury, which returned a verdict in favor of the defendant.

Plaintiff's first assignment of error relates to the admission in evidence of the marble post, galvanized pipe, and hooks. Plaintiff argues that these exhibits were not admissible unless it was first shown that defendant had returned or offered to return the material for the fence to the plaintiff, and he contends that no such showing was made in this case. Plaintiff's argument, while purporting to be directed to the question of the admissibility of this evidence, in reality goes to the merits of defendant's defense. Plaintiff contends that the defendant received and retained the property in his possession, and that, consequently, under the provisions of § 5936, Comp. Laws 1913, and the decision of this court in *Houghton Implement Co. v. Vavrosky*, 15 N. D. 308, 109 N. W. 1024, defendant, in order to effect a rescission of the contract, was required to promptly return or tender a return of the property to the plaintiff.

Plaintiff's argument is based upon an assumed statement of facts which does not exist in this case. There is not an iota of evidence tending to show that the defendant ever received into his possession any of the material involved in this controversy. In fact in plaintiff's complaint it is alleged that "*the defendant has at all times neglected and refused, and still does fail, neglect, and refuse, to accept and receive said fencing.*" And this allegation in the complaint was supported by the testimony of the plaintiff and also by the testimony of the defendant upon the trial. Plaintiff contends, however, that the production

by the defendant of this material, and certain statements made by the defendant's counsel in his opening statement to the jury, show that the defendant had received and taken such property into his possession. The record, however, discloses two statements made by the defendant's counsel during the course of the trial absolutely to the contrary. At one time defendant's counsel stated that the material is still at the depot at Leonard. And when defendant's counsel asked the court for permission to offer the marble post, chain, and hooks in evidence, the trial court asked whether they were in the possession of the defendant, to which question defendant's counsel replied: "Well, we took the liberty of bringing two pieces of the property up here and it is here in the court room." The statement of defendant's counsel, upon which plaintiff relies, was made during his opening statement to the jury and after plaintiff had rested his case. Not an iota of evidence was offered by the plaintiff tending to show that the defendant ever received into his possession or retained any of the property in this controversy, but, on the contrary, the allegations in the plaintiff's complaint and his own positive testimony, as well as the testimony of the defendant himself, tend to show that defendant never received or took any part of the same into his possession. The mere fact that defendant, under the circumstances described by his counsel, brought some of the material into the court room, certainly is not sufficient evidence of the delivery to the defendant by the plaintiff and retention thereof by the defendant, especially in view of the evidence showing the contrary to be true. Plaintiff's entire argument is based upon a theory of facts which has no real existence. The testimony shows clearly and unquestionably that the defendant absolutely refused the shipment, and there is absolutely no ground for the contention that he took or retained in his possession any part of the material in question.

It is undisputed that the marble post, galvanized pipe and hooks offered in evidence by the defendant, and examined by the jury upon the trial, were part of the material shipped by the plaintiff and refused by the defendant. The evidence shows that all four posts were of the same color as the one which was offered in evidence. Defendant contended that this was white marble, and not light blue as provided for in the order. Plaintiff's counsel asserts that the difference in color is a frivolous and technical objection, but we are by no means satisfied that

this is so. A person who agrees to furnish an article in a light blue color certainly cannot claim to have performed his agreement by furnishing one that is white. The defendant in this case desired marble posts of a certain color which he specifically designated in his letter. When posts of a different color and material differing in other respects from the goods ordered were shipped to him, he positively refused to receive the same. "In actions to recover the price or value of goods sold the burden is on plaintiff to prove the existence and validity of the contract of sale, and the terms thereof, the price or value, the delivery and acceptance, of the goods and the amount thereof, and his compliance with the contract, or a waiver of its provision by the buyer, and he has also the burden of proving that goods delivered or tendered complied with the contract." 35 Cyc. 564. See also *Sunshine Cloak & Suit Co. v. Roquette Bros.* 30 N. D. 143, L.R.A.1916E, 932, 152 N. W. 359; *Starke v. Stewart*, 33 N. D. 359, 157 N. W. 302.

Plaintiff also contends that at the time the defendant "repudiated" the contract "the plaintiff was certainly not in fault because a reasonable time had not yet expired for the construction of the fence complete; the defendant gave notice that he refused to perform his implied contract to pay for the materials. Under § 5775, Comp. Laws 1913, the plaintiff was, therefore, at liberty to enforce the obligation of defendant whether the plaintiff had performed or not."

What we have said above wholly disposes of this contention. The defendant ordered certain specified material for fencing a certain cemetery lot. The plaintiff accepted the order and agreed to furnish the materials which defendant ordered. The plaintiff furnished material which differed in essential particulars from those ordered. The evidence does not show or bear out plaintiff's contention that defendant refused to permit plaintiff to carry out the contract between them. The plaintiff never offered to substitute the proper materials or posts of the designated color, but he stood upon the proposition that the material shipped complied with the terms of the order and that the defendant must accept the material shipped. It is upon this theory that he has brought this suit. The jury by its verdict has said that plaintiff failed to furnish the material which defendant ordered, and that plaintiff has failed to perform the conditions of his contract of sale with the defendant.

The evidence in this case is sufficiently in conflict to make the jury's finding binding upon this court. The propositions which we have discussed above, in effect, dispose of all the errors assigned, and we find no error justifying a reversal of the judgment. The judgment and order appealed from must therefore be affirmed. It is so ordered.

CITY OF FARGO, a Municipal Corporation, v. CASS COUNTY,
a Municipal Corporation.

(160 N. W. 76.)

County treasurer — special assessments — in cities — percentage for collecting — retaining — official to collect — county — liability of — money must be turned over to county — to render liable.

1. Various county treasurers from 1901 until 1910 retained for themselves 1 per cent of all Fargo city special assessments as a fee for collection. This action is to recover of the county this 1 per cent, amounting to \$3,847.

The county never received this money, as it was never placed in any fund of the county treasurer. But the city claims that the county treasurer collected as the agent of the county, and which in turn was the collecting agent for the city under the law whereunder the county treasurer collected city special assessments and turned the same over to the city.

There is no statute expressly making the county liable to the city for misapplication of such funds by the county treasurer.

Held: The county treasurer, in making such collections, acted under the law designating him as the official to collect, and no liability of the county to the city arises unless the county actually receives the money of the city; and until the county treasurer turns money so collected over to the county and credits a county fund therewith, the county has not had and received city money.

Note.—That a county is not generally liable for damages caused by defaulting officer where it has not received the benefit of the money or it has not been paid into the county treasury is in accord with the general rule, as will be seen by an examination of the cases collected in a note in 39 L.R.A. 74, on liability of county for damages by defaulting officer, which is subdivision VI. of an extensive note on the liability of counties in actions for torts and negligence.

County — liability for commission on special assessments collected by treasurer — agency — doctrine of — not involved — county — not agent of city — treasurer in collecting — merely official designated.

2. That any liability of the county in such a case must arise from receiving city funds with no doctrine of agency involved, as the county is not an agent of the city in making such a collection; nor does its treasurer in collecting for the city, act as an agent of the county or city, but instead acts only as a person designated by law to collect for the city and for whose shortages or defalcations the county is not responsible to the city unless it has received funds so misappropriated.

County treasurer — collector of special assessments for cities — 1 per cent commission — allowed — retained — county not liable.

3. No liability on the part of the county can be inferred because by statute the bonds of the county treasurer are subject to the approval and action of the administration board of the county, leaving the treasurer without control or supervision by the city. The county officials involved are merely the official machinery designated by law for use in the raising and accounting for revenue for state, county, city, and other purposes.

County treasurer — collector of special assessments for cities — retaining commissions — not entitled thereto — services — reasonable value thereof — question not involved.

4. The county treasurer is not entitled to withhold 1 per cent of city special assessments; and it is immaterial that the official services of that official rendered to the city in collecting city assessments were of a reasonable value of 1 per cent thereof. There is no necessary relation in law between the salary allowed and the work required in office, and there can be no implied authorization to retain a fee on such grounds, where the statute does not grant one.

Opinion filed November 11, 1916. Rehearing denied December 1, 1916.

Appeal from the District Court of Cass County, *Pollock, J.*

Affirmed.

Emerson H. Smith, City Attorney, and *Spaulding & Shure*, for appellant.

Where a county treasurer in his official capacity has money in his hands belonging to another, the remedy is by action against the county as for money had and received. In legal contemplation the county holds the money, hence the county should be sued. *State ex rel. Worcester v. Nelson*, 105 Wis. 111, 80 N. W. 1105.

Money wrongfully paid out by the county treasurer in a settlement

between the county and township must be accounted for by the county. *Cumming Twp. v. Ogemaw County*, 100 Mich. 567, 59 N. W. 240.

"The duties of the county treasurer are imposed by law, and in performing these duties he acts as an officer of the county, and not as the agent of the school district." *Mineral School Dist. v. Pennington County*, 19 S. D. 602, 104 N. W. 270.

The city had no contract on their part with the treasurer, and the knowledge of its officers that the county treasurer was retaining 1 per cent for collecting its special assessments is immaterial, and the city is not estopped to claim its rights. *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Leavenworth v. Rankin*, 2 Kan. 357; *Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535.

"A municipal corporation cannot be made liable for an act of its agent by ratifying it after it is done, where the corporation had no power to authorize such act." *Boom v. Utica*, 2 Barb. 104; *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063; *Gallup v. Liberty County*, 57 Tex. Civ. App. 175, 122 S. W. 291; *Smith v. Philadelphia*, 227 Pa. 423, 76 Atl. 221.

A. W. Fowler, State's Attorney, and *Wm. C. Green*, Assistant State's Attorney, for respondent.

In the absence of statute, there is no liability resting upon the county for the action of its treasurer in defaulting upon the collection and paying over of taxes, and the treasurer, and not the county, is the collector of taxes. *Hart Twp. v. Oceana County*, 44 Mich. 417, 6 N. W. 863; *Vigo Twp. v. Knox County*, 111 Ind. 170, 12 N. E. 305; *White Sulphur Springs v. Pierce*, 21 Mont. 130, 53 Pac. 103; *Atlantic County v. Weymouth Twp.* 68 N. J. L. 652, 54 Atl. 458; *Wood v. Monroe County*, 50 Hun. 1, 2 N. Y. Supp. 369; *First Nat. Bank v. Saratoga County*, 106 N. Y. 488, 13 N. E. 441; *People ex rel. Martin v. Brown*, 55 N. Y. 187; *Westboro v. Taylor County*, 90 Wis. 355, 63 N. W. 287; *School Dist. v. Saline County*, 9 Neb. 403, 2 N. W. 877; *Lancaster County v. State*, 74 Neb. 211, 104 N. W. 187, 107 N. W. 388; *Aplin v. Van Tassel*, 73 Mich. 28, 40 N. W. 847; *Crandon v. Forest County*, 91 Wis. 239, 64 N. W. 847.

Our system of taxation was taken from Minnesota. *St. Paul & S. C. R. Co. v. Robinson*, 40 Minn. 360, 42 N. W. 82; *St. Paul v. Colter*, 12 Minn. 51, Gil. 16, 90 Am. Dec. 278; *Guilder v. Dayton*, 22 Minn.

371; Logan County v. Carnahan, 66 Neb. 685, 92 N. W. 984, 95 N. W. 812.

"In dealing with taxes certified by city authorities to the county clerk, neither the county clerk nor the county treasurer acts as agent of the county." Kelley v. Gage County, 67 Neb. 6, 93 N. W. 194, 99 N. W. 524.

"A county is not liable in damages for the negligent acts of its officers, unless made so by statute." Hopper v. Douglas County, 75 Neb. 329, 106 N. W. 330; Gray v. Tompkins County, 93 N. Y. 603; State ex rel. Atty. Gen. v. Leavenworth County, 2 Kan. 61; Crandon v. Forest County, 91 Wis. 239, 64 N. W. 848; Cedar Rapids, I. F. & N. W. R. Co. v. Cowan, 77 Iowa, 535, 42 N. W. 436; Mineral School Dist. v. Pennington County, 19 S. D. 602, 104 N. W. 270; Vinton v. Cattaraugus County, 89 Hun, 582, 35 N. Y. Supp. 285; Newbold v. Douglass, 123 Wis. 28, 100 N. W. 1040; Crowninshield v. Cayuga County, 124 N. Y. 583, 27 N. E. 242; Bridges v. Sullivan County, 92 N. Y. 572; Cumming Twp. v. Ogemaw County, 100 Mich. 567, 59 N. W. 240.

The county treasurer, and not the county, is the agent of the city in collecting its taxes. Pol. Code, chap. 42, art. 13, Comp. Laws 1913, §§ 3341, 3342, et seq. 3682, Laws 1905, chap. 62.

Assuming that this 1 per cent does not belong to the county treasurer, and that the county is liable for it, it clearly would not belong to the city. It would belong to the individual taxpayer, and the city could not recover. Westboro v. Taylor County, 90 Wis. 355, 63 N. W. 287; Dickey County v. Hicks, 14 N. D. 73, 103 N. W. 423; Krump v. First State Bank, 8 N. D. 75, 76 N. W. 995.

The collection of delinquent taxes is analogous to an open account, and the defendant would not be liable for interest from the date of collection, but only from the date of demand. Spooner v. Washburn County, 124 Wis. 24, 102 N. W. 325.

It is well settled that although a bond of a public official may run to the county or state, a recovery may be had thereon by any corporation aggrieved in an action in its name. Hollister v. Hubbard, 11 S. D. 461, 78 N. W. 949; Guernsey v. Tuthill, 12 S. D. 582, 82 N. W. 190; Stewart v. Carter, 4 Neb. 564; Rogers v. Gosnell, 51 Mo. 466; Taaffe v. Rosenthal, 7 Cal. 515; People v. Holmes, 5 Wend. 191; Kollock v. Parcher, 52 Wis. 393, 9 N. W. 67; Pioneer Fire-Proof & Constr. Co.

v. McClay, 54 Neb. 663, 74 N. W. 1063; 3 Enc. Pl. & Pr. 640; Lee v. Charmley, 20 N. D. 570, 33 L.R.A.(N.S.) 275, 129 N. W. 448.

Goss, J. This action for money had and received is brought by the city of Fargo against Cass county for \$3,847 and interest. The city has appealed from a judgment of dismissal. The facts are undisputed. Various county treasurers of Cass county from July, 1901, until November, 1910, retained 1 per cent of all city special assessments, as fees for collection. This action is brought to recover the aggregate of such deductions.

The county contends that this 1 per cent was misappropriated by said officials, and that it has not had or received the use or benefit of any part of said so-called commissions; and under the uncontroverted proof and findings such is the fact. These amounts were taken without authority of law, and none of the deductions ever reached the coffers of the county, unless it can be said that the payment of the county treasurer was a payment to the county. But as no part of this amount was ever credited to or placed in any county fund, then as between these two municipalities the county has not received it. The county treasurers simply have failed to turn over this amount to either the county or the city, retaining it themselves. Hence any liability of the county to the city must be predicated upon the premise that the county is the agent of the city in the collection of city special assessments, and therefore that the action of the county treasurer in receiving payment bound the county as a collecting agent for the city to make good to the latter any defalcation or shortage of the county treasurer. This in turn depends upon whether a county treasurer is in a legal sense an agent of the county in the collection of such taxes, and whether as between municipalities the doctrine of *respondeat superior* applies to hold the county liable for misappropriation of city funds by its county treasurer, where no statute creates such a liability.

Without tracing in this opinion the history of the statute, it is sufficient to state that statutes have authorized these county treasurers to collect said special assessments and turn the full amount collected without any deduction whatever, over to the city. Special assessments levied by the city are trust funds and collectable by the county treasurer for the city, to be applied and disbursed by it for particular purposes,

Pine Tree Lumber Co. v. Fargo, 12 N. D. 360-377, 96 N. W. 357; State ex rel. Viking Twp. v. Mikkelsen, 24 N. D. 175, 139 N. W. 525. While the county is responsible to the state "for the full amount of taxes levied for state purposes," § 2183, Comp. Laws 1913, there is no corresponding statutory liability of the county to the city. Consequently, the county cannot be held by the city for diversion of city funds collected by the county treasurer unless the county actually received the funds so diverted. Then, and only then, can the county be held as for moneys had and received by it. And such liability is not predicated upon any doctrine of agency. Under no circumstances can the county be held by the city for a shortage of the county treasurer in city money collected, where the county has not received either the money diverted or a resulting benefit therefrom. While the county treasurer made these collections under authority of law, nevertheless he "was the custodian of the money, *selected not by the county but by the law*," Gray v. Tompkins County, 93 N. Y. 603. "We are of opinion that the moneys due the state were payable by the treasurer of the county, not as its officer or agent, but as an individual designated by his official name for the performance of specific duties, and that the county is not responsible for his omissions or defaults in respect thereto, nor at all concerned with them any further, nor in any other manner, than the law has declared." First Nat. Bank v. Saratoga County, 106 N. Y. 488-495, 13 N. E. 439. The state sought to recover from a county for state taxes collected and embezzled by a county treasurer where no statute similar to § 2193, Comp. Laws 1913, declared the county liable to the state therefor.

It is precedent on the facts in this instant case and announces the law applicable. This is but another application of the rule early announced in the leading case of Lorillard v. Monroe, 11 N. Y. 392, 62 Am. Dec. 120, holding that "a town is not responsible for any mistake or misfeasance of the assessors and collectors in the performance of their official duties; they are not its agents." The court says: "The imposition and collection of the public burthens is an essential and important part of the political government of the state, and it is committed, in part, to the agency of officers appointed by the local divisions called towns, and in part to the officers of the counties, upon reasons of economy and convenience; and the official machinery which is organized

within the towns and counties is public in the same sense as is that part of the same system which is managed by the state officers residing at the seat of government, and whose operations embrace the whole state. . . . The assessors and collectors of taxes are independent public officers, whose duties are prescribed by law, and that they are not, in any legal sense, the servants or agents of the towns, and that the towns, as corporations, are not responsible for any default or malfeasance in the performance of their duties. . . . In *Martin v. Brooklyn*, 1 Hill, 545, the rule was laid down by the late Justice Cowen, that even a municipal corporation was not liable for the misfeasance or nonperformance of one of its officers in respect to a duty imposed by the statute upon such officer, though it was conceded, that if the duty had been imposed [by the statute] upon the corporation, as in the case of streets and sewers, which the corporate body was bound to repair, the rule would have been otherwise. . . . *A fortiori*, where the duty which has been violated was imposed by a public law of the state, the corporation, though it had the appointment of the officer, would not be liable." And this has been followed and these principles applied in a case in all material particulars identical with the case at bar and under almost identical statutes in Indiana, in *Vigo Twp. v. Knox County*, 111 Ind. 170, 12 N. E. 305, the syllabus reading: "A county treasurer is in no such sense the agent of the county as that the maxim *Respondeat superior* can be invoked to hold the county liable for his misappropriation of public funds, in the absence of a statute creating such liability." In the opinion it is said: "Counties, in a very important sense, occupy a double relation. In one relation, a county is a municipal corporation, charged with corporate functions and duties, and invested with corporate powers. These are exercised for the benefit of the municipality, and in respect to these the county is responsible. A county is also a territorial and political division of the state, established as an instrumentality of government and municipal regulation. . . . Some of the duties of county boards, as well as other county officers, relate to and are exercised in the discharge of their functions as governmental agencies. Of this character are the duties of the board, as also those of the county treasurer and auditor, so far as they are connected with the revenue system of the state. In exercising these duties the officers exert a power delegated immediately to them by the state, for the benefit of

all the citizens who are affected by the sovereign power which pertains to the levying and collecting of taxes. The county as a municipality is not specially interested in the exercise of these powers, except so far as they relate to its own municipal affairs. It is hence not liable for derelictions of officers in respect to their conduct as mere agents of the government. . . .

"He [the county treasurer] is a person selected in the manner prescribed by law, and has certain public functions to perform, which are all prescribed by statute, and primarily laid upon him, and for the performance of which he is held civilly and criminally responsible. He is not, therefore, the agent of the county in respect to funds collected by him for townships, nor can the county be held answerable for his delinquency, in the absence of an express statute making it liable. This is according to the principle deducible from the authorities, which hold, in effect, that a municipal corporation is not to be regarded as principal, and therefore liable for the defalcations and delinquencies of its public officers in failing to perform public duties which the law has laid upon them, and in respect to which the municipality is neither invested with corporate power, nor charged with any corporate duty or statutory liability, and from the performance of which it derives no special advantage. The officer, under such circumstances, is regarded as an independent public agent, or quasi civil officer of the government, personally answerable for his misconduct or official delinquencies, and not the agent or servant of the municipality. Omissions of duty imposed upon such an officer by law, however injurious they may be to others, are not injuries for which the corporation of which he is nominally an officer is liable."

The case cites *Hannon v. St. Louis County*, 62 Mo. 313; *Morrison v. Lawrence*, 98 Mass. 219; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196, and *Ogg v. Lansing*, 35 Iowa, 495, 14 Am. Rep. 499; *Maxmilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Prather v. Lexington*, 13 B. Mon. 559, 56 Am. Dec. 585; *Mead v. New Haven*, 40 Conn. 72, 16 Am. Rep. 14; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Fowle v. Alexandria*, 3 Pet. 398, 7 L. ed. 719. The same reasoning was applied in *Board of Education v. Boyd*, 58 Mo. 276, citing *Reardon v. St. Louis County*, 36 Mo. 555; *Ray County use of Common School Fund v. Bentley*, 49 Mo. 236.

The following is from 11 Cyc. 517: "Where taxes due a township or village are by virtue of statute collected by the county treasurer, the city is liable to the township therefor when the treasurer refuses to pay them over."

The authorities cited under this text are found in the brief of the appellant; *viz.*, *White Sulphur Springs v. Pierce*, 21 Mont. 130, 53 Pac. 103; *Potter County v. Oswayo Twp.* 47 Pa. 162; and *Oneida v. Madison County*, 136 N. Y. 269, 32 N. E. 852. Examination discloses that this text is not applicable under the facts before us, where the tax is not paid over to the county. If applied to the facts in suit, these cases do not sustain the text. The *Montana* case was not against the county, but against its county treasurer, who was compelled to pay over taxes in a suit in which the validity of the ordinance authorizing the tax levy was attempted to be litigated. The question under consideration was neither involved nor considered. In the *New York* case the county treasurer, after receiving the fund in dispute belonging to the village, "paid out the same for general county purposes," and the county so receiving the money from its treasurer must respond to the village entitled to it instead. This one case like others cited in the brief of appellant is within a well-defined exception to the general rule of non-liability under discussion. The county, having received the money, is liable as for money received. The *Pennsylvania* case may be taken either way from the fact that it does not clearly appear whether the shortage was one upon the county books with the county treasurer embezzling county funds leaving the county short with the township, or whether it was a case similar to that under consideration on the facts. If the case be construed as supporting appellant's contention, it stands alone as precedent. But if taken as applying to facts under which the county was charged on its books with the township's money, with county funds embezzled, it is in harmony with authority. However, the text quoted from 11 Cyc. 517, is qualified by the further statement: "A township which has suffered a loss of its funds by the defalcation of the county treasurer is entitled to its proportion of a sum recovered on his bond, but it cannot maintain an action therefor against the county unless its share has actually been covered into the county treasury to the credit of the general fund." This qualification is in harmony with the cases.

The city stands in no different position than one asking the recovery

of taxes illegally and involuntarily paid to a tax collector. In such case the test as to whether the action lies against the county or on the contrary must be prosecuted against the official depends upon whether the county has received the money from the official. In *Cooley on Taxation*, at page 1508, the rule is stated to be: "The proper action against a municipality in these cases is assumpsit for money had and received, the liability not attaching *until the money is paid over, and being then based upon the receipt of the money*, and not upon the illegalities which preceded it."

Appellant cites several cases as sustaining a recovery by the city. In *State ex rel. Worcester v. Nelson*, 105 Wis. 111, 80 N. W. 1105, it was held that though the township was entitled to the money, yet, when it had passed into the county treasury, and had become a part of the county moneys, though still in the custody of the treasurer, it could not be recovered by mandamus against the official. In *Newbold v. Douglas*, 123 Wis. 28, 100 N. W. 1040, it was held, in harmony with the general rule, that resort must be had against the county, *it having received the money*, and that the action could not be maintained against the county treasurer. In *Cumming Twp. v. Ogemaw County*, 100 Mich. 567, 59 N. W. 240, it was held, quoting from the syllabus: "Where the county treasurer wrongfully paid out money collected from delinquent taxes belonging to a township, it is no defense to an action therefor against the county that the board of supervisors had settled with the county treasurer before it had notice of the township's claim."

Nothing in that holding favoring appellant's contention. In *Iowa City v. Johnson County*, — Iowa, —, 61 N. W. 995, it seems that a recovery was allowed under circumstances very similar to those at bar, but upon a stipulation that "it was mutually understood and agreed between said city and the defendant . . . that the city should pay to the said county for collecting said taxes, 2 per cent on the dollar, both parties acting upon the theory and belief that under the law the county treasurer was entitled to charge said amount,—2 per cent on the dollar for collecting such taxes,—and said county treasurer did deduct from such money so collected, 2 per cent under a misapprehension of the law."

In disposing of a contention it was decided merely that the money could not be retained as paid to the official under a mistake of law.

Judgment was ordered against the county. But upon a rehearing it was held that no appeal had been taken, and what was said in the first opinion was withdrawn and the appeal dismissed for want of jurisdiction, in 99 Iowa, 513, 68 N. W. 815. No questions raised here were there involved or considered. The same is true in Mineral School Dist. v. Pennington County, 19 S. D. 602, 104 N. W. 270, relied upon by appellant. The only question was whether the county could charge back against a school district a proportionate share of county expense in collecting taxes levied by the school district, and collectable by the county. It was held to be a county, and not a school district, expense. In the opinion the following language set forth in appellant's brief is used: "The duties of the county treasurer were imposed by law, and in performing these duties he acted as an officer of the county, and not the agent of the school district." This does not state as appellant would construe it that the official was an agent of the county. He acted because required so to act by statute. No relation of principal and agent existed between the county and its official.

The city contends that our statutes are peculiar and should be construed without reference to holdings upon statutes elsewhere. However, as the statutes of this state were enacted with reference to the rules of law generally applicable to the collection of taxes by counties and its constituent municipalities, it would do violence to the ordinary rules of statutory construction to disregard all precedent. Nor do our statutes differ greatly from those in many states, as the decisions cited will disclose.

The city also contends that inasmuch as the approval of the county treasurer's bonds, inspection of his books, making of settlements with him, and supervision of his office generally, is placed by statute with county officials to the exclusion of those of the city, the county should be held liable. The same contention was urged in Indiana in *Vigo Twp. v. Knox County*, 111 Ind. 170, 12 N. E. 307, and is there answered as follows: "Whatever supervisory power boards of commissioners have in respect to approving official bonds, inspecting the accounts of, and making annual settlements with, county treasurers, is not committed to them as duties or functions pertaining to the municipal corporation, but rather as the exercise of a portion of the administrative or political power of the state. In all that the commissioners are authorized to do

in respect to the control or supervision of the county treasurer or his duties, or in respect to the levying and collection of taxes, they become merely a part of the official machinery which is organized within each county for the purpose of raising revenue for state, county, township, and other local purposes. *Lorillard v. Monroe*, 11 N. Y. 392, 62 Am. Dec. 120."

The determining basic principle in this decision is that it is the wrongful receipt and retention of city funds that must render this county liable, if at all, and that no theory of agency of the tax collector can do so. This principle is recognized by the reasoning in *Northern Trust Co. v. First Nat. Bank*, 33 N. D. 1, 156 N. W. 214. It is there said: "And again let us suppose that McConville pretended to pay out \$7,000 of the county's money to himself as treasurer of one of the school districts, but that in fact the money remained in the Cass county treasury. Supposing then that McConville was removed as county treasurer, and the school district sued Cass county for the money, showing that this particular \$7,000 had always remained part of the Cass county funds. Can it be doubted that the school district would recover judgment?"

As a guide to county officials it may be said that the county is incorrect in its content'n that the law formerly authorized the retention by county treasurers of 1 per cent of city special assessments collected, as a fee for such services rendered. There no longer exists any right to make such a deduction, even though the city had, under the requirements of § 3729, Comp. Laws 1913 (since expressly repealed by chap. 75, Sess. Laws 1915), added 1 per cent to the special assessment. Such would constitute a surplus and remain a part of the special assessment fund, and as such belong to the city. *State ex rel. Viking Twp. v. Mikkelsen*, 24 N. D. 175, 139 N. W. 525. It is also immaterial that the services rendered by the county treasurers in collecting the special assessment and accounting to the city were of the reasonable value of the 1 per cent attempted to be charged therefor. There is no necessary relation in law between the salary allowed and the work required in the performance of official duties. It is sufficient to say that before the fee could be retained the law must plainly authorize its retention. *State v. Stockwell*, 23 N. D. 70, 134 N. W. 767; *State ex rel. Braatlien v. Drakeley*, 26 N. D. 87, 143 N. W. 768. Before a portion of this trust

fund can be lawfully segregated and retained, statutory sanction for it must be found, and there is none. The judgment appealed from is affirmed.

B. L. SHUMAN v. MARTIN O. RUUD.

(160 N. W. 507.)

Judgment notwithstanding verdict — appeal — assumed premise — expert testimony — services rendered — by attorney — value of — question — one of fact — for jury.

1. From a judgment *non obstante veredicto* defendant appeals. Said judgment was based upon the assumed premise that uncontradicted expert testimony as to the value of services rendered by an attorney established their value as a fact so as to override the verdict of a jury finding them to have been of less value.

Held, though plaintiff's experts all agree upon the value of said services to be the amount for which judgment was subsequently ordered *non obstante veredicto*, nevertheless the question remained one of fact for the jury to determine as such.

Services of attorney — value of — verdict — conclusive — order for judgment — for greater amount — error.

2. The verdict was conclusive on the value of such services, and it was error to order judgment *non obstante veredicto* for the greater amount.

Opinion filed December 2, 1916.

Appeal from the District Court of Pierce County, *Burr*, J.
Modified and judgment directed to be entered on the verdict.
R. E. Wenzel, for appellant.

It is proper to receive expert testimony as to the prices usually and customarily charged by persons in the same profession and in the same locality. But such witnesses should be left to form and frame their own answers as to the value of the services rendered, instead of having the amount charged included in improper hypothetical questions. 2 Enc. Ev. p. 165; *Spencer v. Collins*, 20 Ann. Cas. 55, note; *Maneaty v. Steele*, 112 Ill. App. 19.

Expert opinion evidence on the question of the value of the services rendered by an attorney is not conclusive. The fact still remains a ques-

tion for the jury. 2 Enc. Ev. p. 172; *Spencer v. Collins*, 20 Ann. Cas. 56, note; *Head v. Hargrave*, 105 U. S. 45, 26 L. ed. 1028; *Langford v. Jones*, 18 Or. 307, 22 Pac. 1064; *Campbell v. Brown*, 81 Kan. 480, 26 L.R.A.(N.S.) 1142, 106 Pac. 37; *Hull v. St. Louis*, 42 L.R.A. 764, note; *Re Dorland*, 63 Cal. 281; *Clark v. Ellsworth*, 104 Iowa, 442, 73 N. W. 1023; *Arndt v. Hosford*, 82 Iowa, 499, 48 N. W. 981; *Olson v. Gjertson*, 42 Minn. 407, 44 N. W. 306; *Moore v. Ellis*, 89 Wis. 108, 61 N. W. 291; *Lee v. Lomax*, 219 Ill. 218, 76 N. E. 377; *Noftzger v. Moffett*, 63 Kan. 354, 65 Pac. 670; *Turnbull v. Richardson*, 69 Mich. 400, 37 N. W. 499; *Bourke v. Whiting*, 19 Colo. 1, 34 Pac. 172; *State v. Miller*, 9 Houst. (Del.) 564, 32 Atl. 137; *Humphries v. Johnson*, 20 Ind. 190; *Bentley v. United States*, 26 Ct. Cl. 241; *Cosgrove v. Leonard*, 134 Mo. 419, 33 S. W. 777, 35 S. W. 1137; *Walbridge v. Barrett*, 118 Mich. 433, 76 N. W. 973; *Kittredge v. Armstrong*, 11 Ohio Dec. Reprint, 661, 28 Ohio L. J. 249; *Freese v. Pennie*, 110 Cal. 467, 42 Pac. 978; *Rose v. Spies*, 44 Mo. 20; *McMannomy v. Chicago, D. & V. R. Co.* 167 Ill. 497, 47 N. E. 712; *Zimmer v. Kilborn*, 165 Cal. 523, 132 Pac. 1026, Ann. Cas. 1914D, 368.

The trial court had no right to order judgment notwithstanding the verdict for a larger sum than found by the jury. *Remington v. Eastern R. Co.* 109 Wis. 154, 84 N. W. 898, 85 N. W. 321; *Speiser v. Merchants' Exch. Bank*, 110 Wis. 506, 86 N. W. 243; *Richardson v. Tyson*, 110 Wis. 572, 84 Am. St. Rep. 937, 86 N. W. 250; *Richmire v. Andrews & G. Elevator Co.* 11 N. D. 453, 92 N. W. 819; *Ætna Indemnity Co. v. Schroeder*, 12 N. D. 120, 95 N. W. 436; *Nelson v. Grondahl*, 12 N. D. 133, 96 N. W. 299; *Welch v. Northern P. R. Co.* 14 N. D. 25, 103 N. W. 396; *Houghton Implement Co. v. Vavrosky*, 15 N. D. 308, 109 N. W. 1024; *Kerr v. Anderson*, 16 N. D. 38, 116 N. W. 614; *Kirk v. Salt Lake City*, 32 Utah, 143, 12 L.R.A.(N.S.) 1023, 89 Pac. 458.

Campbell & Jongewaard, for respondent.

A motion for a new trial must be made within sixty days from the date of the verdict. This requirement is in no wise dependent upon the entry of judgment or service of notice thereof. 29 Cyc. 850, 851; Comp. Laws 1913, § 7664.

The application for judgment notwithstanding the verdict, or for a
35 N. D.—25.

new trial, may be separate or combined; but the former alone does not entitle the applicant to a new trial. 29 Cyc. 726-753.

A subject not in any manner touched upon indirect examination cannot be gone into on cross-examination, and a proper objection should be sustained. *Hogen v. Klabo*, 13 N. D. 319, 100 N. W. 847.

Where a trial judge knows of his own knowledge facts about a case being heard by him, he has no right to apply or use them. He must get his information from evidence adduced in open court. If he relies upon facts of which he has personal knowledge, he should lay aside the judicial ermine and take his place in the witness box. *Ladd v. Witte*, 116 Wis. 35, 92 N. W. 365; *Nelson v. Grondahl*, 12 N. D. 133, 96 N. W. 299; *Territory v. Whitcomb*, 1 Mont. 359, 25 Am. Rep. 740, 2 Am. Crim. Rep. 159; *Wood v. Barker*, 49 Mich. 295, 13 N. W. 597.

Goss, J. Plaintiff recovered of defendant a verdict for \$210 as a balance of attorney fees. Not satisfied with his recovery, plaintiff moved for judgment notwithstanding the verdict for \$370, claiming that the undisputed expert testimony of plaintiff and an expert witness as to the value of attorney fees rendered by plaintiff conclusively established their value to be \$370, and hence that there had been no issue on the question of value for the jury to pass upon. The motion was granted, and judgment *non obstante veredicto* was ordered for \$370 and interest. From this judgment defendant appeals.

The question presented therefore is whether uncontroverted expert testimony as to value of attorneys' fees so conclusively established the value of such fees to be as so fixed by experts as to establish such value as a fact and warrant a judgment *non obstante* as entered, where a jury have found the value thereof to be less. This resolves to the legal effect or probative force of expert testimony as to value of attorney fees. If the expert testimony conclusively established as a fact the value in the amount testified to by the expert, judgment was properly entered; if not, judgment should have been entered instead on the verdict.

There is no conflict in the expert testimony as to value of such legal services, nor in the services as rendered. Defendant contended the services were worth no more than \$150; the jury found the fact to be that their value was \$230.

The trial court was in error in granting judgment for a greater

amount than the verdict. While there is some conflict as to the probative force of expert testimony of the worth of medical and surgical services, there seems to be none as to the corresponding value of attorney fees. And in every instance the value of attorney fees becomes a question of fact to be determined by the jury even where the expert testimony as to value is all in one accord and without conflict or is uncontradicted.

The very recent and excellent treatise, "Modern Law of Evidence," by Chamberlayne, §§ 2172A et seq. contains the following discussion on this very question: "The jury are not necessarily obliged to follow the estimate of a witness simply because he is uncontradicted. Such inferences are not conclusive. It is to be remembered that the conclusion of a witness as to value is merely secondary evidence, displacing, only to the extent that seems to be necessary, the reasoning of the jury upon the primary phenomena narrated by witnesses. It follows that neither the inference or conclusion of an observer nor the more ripened judgment of the expert relieves the jury of the duty of doing their own reasoning with regard to the facts of the case. American courts have gone to very considerable lengths, in this respect, in carrying out the so-called democratic policy of extending the function of the jury at the expense of that of the court. They have been permitted to act of their own knowledge, in the absence of all evidence, as to the fact regarding the value of property or services of a technical nature. For example, the fair price for an attorney's work may be fixed by the jury. The same rule has been applied to the findings of a jury as to the value of other services requiring special skill and experience; *e. g.*, those rendered in the compilation of municipal charters and ordinances. The reasoning of the jury, being based upon common knowledge, cannot with safety to the cause of justice be left unfettered in dealing with estimates of value where the inference must be founded upon special skill. Thus, a state of the case may arise in which they will not be permitted to consider the question of value at all. This will happen where the determination of monetary worth can only be properly reached through the estimates of those possessed of special skill or experience, and no such persons have appeared to testify. A slight addition to the customary situation may bring into manifestation the operation of a somewhat different procedural principle,—the right of a party to the use of reason. In much the same way, should the estimate be one

demanding a high degree of special knowledge and technical skill and such evidence be properly placed before the jury, the latter will not be permitted to disregard this testimony for the purpose of following their own ignorance on the subject. Such a course would be unreasonable and may be promptly set aside by a presiding judge or reversed in an appellate court. Thus, where the only evidence as to the value of a physician's services of a technical nature has been furnished by a medical witness, it would be error to instruct the jury that they may disregard such evidence and follow their own judgment."

To the same effect see *Spencer v. Collins*, 20 Ann. Cas. 49, and extensive note digesting the cases cited as follows: "It is well settled that the opinion evidence of expert witnesses as to the value of and attorney's services is not conclusive; nor is it binding either on the court or on the jury. But such evidence is to be taken into consideration, with all the other evidence in the case, in arriving at a conclusion as to the just value of the services performed. . . . It is the province of the jury to weigh the testimony of attorneys as to the value of the services, by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying to it their own experience and knowledge of the character of such services. The evidence of experts as to the value of professional services does not differ, in principle, from such evidence as to the value of labor in other departments of business, or as to the value of property. The jury should apply their own general knowledge and ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed; and it is only in that way that they can arrive at a just conclusion. While they cannot act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and to act intelligently they must, judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry. Other persons besides professional men have knowledge of the value of professional services; and while great weight should always be given to the opinions of those familiar with the subject, they are not to be blindly received, but are to be intelligently examined by the jury in the light of their own general knowledge. *Head v. Hargrave*, 105 U. S. 45, 26 L. ed. 1028; *Kitredge v. Armstrong*, 11 Ohio Dec. Reprint, 661, 28 Ohio L. J. 249."

To the same effect see *Zimmer v. Kilborn*, Ann. Cas. 1914D, 368 and note thereto (165 Cal. 523, 132 Pac. 1026); *Hull v. St. Louis*, 42 L.R.A. 753, and extensive note (138 Mo. 618, 40 S. W. 89); *Babbitt v. Bumpus*, 16 Am. St. Rep. 585, and note (73 Mich. 331, 41 N. W. 417).

Respondent cites *Ladd v. Witte*, 116 Wis. 35, 92 N. W. 365, upon conclusiveness of expert testimony as to value of fees of a physician and surgeon. As above stated fees for this class of services are held by a few courts to constitute an exception to the general rule. Whether right or wrong, logical or otherwise, the exception does not apply to fees of attorneys. In this there is entire harmony. See the later Wisconsin case of *Larscheid v. Kittell*, 142 Wis. 172, 125 N. W. 442, 20 Ann. Cas. 576.

Other questions are improperly sought to be raised on this appeal. A useless motion to reinstate the verdict and for judgment thereon was made after the judgment *non obstante* was ordered. The attempted appeal from this order raised no issue, as that is a nonappealable order. The only appeal is the one taken from the judgment. As no specification of error raises any question upon any ruling on the trial, no inquiry can be made as to errors upon trial. The only matter for review is the ordering of judgment *non obstante*, as to which the learned trial court committed error.

It is therefore ordered that the proceedings taken upon and subsequent to the motion for judgment notwithstanding the verdict be vacated, and that judgment be entered upon the verdict for \$210 and interest and trial court costs and disbursements, and that there be credited thereon in reduction thereof defendant's taxable costs and disbursements on his motion to vacate and for his costs on this appeal, to which defendant is also entitled. It is so ordered.

DAVID GUNSCH and Christina Gunsch v. URBAN MERCANTILE COMPANY, a Corporation.

(160 N. W. 60.)

Government land — entryman on — mortgage by — single man — contest — prior entry — crop planted — final order on contest — before filing — valid lien — against entryman — homestead rights — even though he marries — final proof.

A mortgage which is given by an entryman on government lands while a single man, and pending a proceeding to contest and cancel a prior homestead entry, and after he has planted a crop on said land, and after the determination of the contest in his favor in the local land office, but before the issuance of the final order by the General Land Office, and before he has actually filed as an entryman under his preference right, is a valid lien both as against the entryman and the family homestead rights, even though such entryman may have married between the time of the execution of such mortgage and the final order of the General Land Office and his filing thereunder, final proof having subsequently been made.

Opinion filed November 4, 1916. Refiled December 2, 1916. Rehearing denied December 2, 1916.

Appeal from the District Court of Mercer County, *J. M. Hanley, J.*
Action to determine adverse claims to real estate.

Judgment for defendant. Plaintiffs appeal.
Affirmed.

Statement of facts by BRUCE, J.

This is an action to determine adverse claims to real property, and comes to us for a trial *de novo*. On July 8, 1908, the plaintiff, David Gunsch, commenced a contest to cancel a prior homestead entry on the land in question. On February 24, 1909, said contest was decided in

NOTE.—Those provisions of the homestead laws that land shall not be liable for debts incurred prior to the issuance of a patent are for the benefit of the homesteader, and they do not prevent a voluntary subjection of the land as security for debts created prior to the patent, as will be seen by an examination of the cases in a note in 6 L.R.A.(N.S.) 934, on the validity of a mortgage upon public lands executed by claimant under the homestead acts prior to patent or final proof

the local land office in his favor. In April, 1909, Gunsch planted a crop on the land. On August 25, 1909, he executed a mortgage on the land to the Minneapolis Threshing Machine Company, containing the usual covenants, and which the mortgage was recorded on October 18, 1909. On March 8, 1910, plaintiffs, David Gunsch and Christina Gunsch, intermarried. On March 28, 1910, the Commissioners of the General Land Office of the United States issued an order canceling the prior homestead entry. On April 27, 1910, David Gunsch filed a homestead entry. On February 1st, 1913, the Minneapolis Threshing Machine Company assigned the notes and mortgage to the defendant, Urban Mercantile Company. This assignment was recorded on February 18, 1913. On February 24, 1914, the plaintiff, David Gunsch, made final proof. On July 21, 1914, patent was issued. The plaintiffs, husband and wife, have made their home on the land ever since they were married. On April 8, 1915, a judgment was entered in the district court of Mercer county in an action to quiet title, in which David Gunsch was the sole plaintiff, and the Urban Mercantile Company, the defendant, which adjudged and decreed the mortgage to be a lien on said land. No appeal was taken from this judgment.

Thornstein Hyland, for appellants.

The pleadings in the former action show that the question of homestead was not in issue. The area and the value must be pleaded. *Severtson v. Peoples*, 28 N. D. 372, 148 N. W. 1054; *Horton v. Emerson*, 30 N. D. 258, 152 N. W. 529, and cases cited; *Coyle v. Due*, 28 N. D. 400, 149 N. W. 122, and cases cited.

To constitute an estoppel by judgment, the cause of action in the former and subsequent proceedings must be identical. *Stitt v. Rat Portage Lumber Co.* 101 Minn. 93, 111 N. W. 948.

The test of the identity of causes of action for the purpose of determining the question of *res judicata* is the identity of the facts essential to their maintenance. *Harrison v. Remington Paper Co.* 3 L.R.A.(N.S.) 954, 72 C. C. A. 405, 140 Fed. 385, 5 Ann. Cas. 314; *Wells-Stone Mercantile Co. v. Aultman*, 9 N. D. 520, 84 N. W. 375; *Linne v. Stout*, 44 Minn. 110, 46 N. W. 319; *Bigley v. Jones*, 114 Pa. 510, 7 Atl. 54.

A mortgage upon real estate not then owed by the mortgagor, but

afterwards acquired, attaches to and covers the title, and is a valid lien upon such real estate at once upon the acquisition of title by the mortgagor. But this rule does not apply to government homestead. 32 Cyc. 1036d, 88; *Hussman v. Durham*, 165 U. S. 144, 41 L. ed. 664, 17 Sup. Ct. Rep. 253; *Denver v. Mullen*, 7 Colo. 345, 3 Pac. 693.

A mortgage or deed of the homestead must be executed by both husband and wife. Rev. Codes, §§ 5607, 5608.

It is not necessary that a party make actual residence in order to make a certain piece of real estate the homestead, if it is intended that such tract shall be the homestead, and this intention will be ascertained from the surrounding circumstances. *Mandan Mercantile Co. v. Sexton*, 29 N. D. 602, 151 N. W. 780, Ann. Cas. 1917A, 67; 21 Cyc. 425d; *Reske v. Reske*, 51 Mich. 541, 47 Am. Rep. 594, 16 N. W. 895; *Dewille v. Widoe*, 64 Mich. 593, 8 Am. St. Rep. 852, 31 N. W. 533; *Barber v. Rorabeck*, 36 Mich. 399; *Bouchard v. Bourassa*, 57 Mich. 8, 23 N. W. 452; *Griffin v. Nichols*, 51 Mich. 575, 17 N. W. 63; *Scofield v. Hopkins*, 61 Wis. 370, 21 N. W. 259; *Hawthorne v. Smith*, 3 Nev. 182, 93 Am. Dec. 397; *Arendt v. Mace*, 9 Am. St. Rep. 209, note; *Gill v. Gill*, 69 Ark. 596, 55 L.R.A. 191, 86 Am. St. Rep. 213, 65 S. W. 112.

"That the homestead estate is granted for the benefit of the family, and not for the benefit of the husband and father." *Rosholt v. Mehus*, 3 N. D. 513, 23 L.R.A. 239, 57 N. W. 783; *Fore v. Fore*, 2 N. D. 260, 50 N. W. 712; *Dieter v. Fraine*, 20 N. D. 484, 128 N. W. 684; *First International Bank v. Lee*, 25 N. D. 197, 141 N. W. 716; *Edmondson v. White*, 8 N. D. 72, 76 N. W. 986.

"It is the law that a covenant in a mortgage of the homestead, executed by the husband alone, cannot work an estoppel against the mortgagor." *Perdee v. Furbush*, 95 Am. St. Rep. 922, note; *Alt v. Banholzer*, 39 Minn. 511, 12 Am. St. Rep. 681, 40 N. W. 830.

It would nullify the statute to hold that the deed which the law declares void should, by reason of the covenant of the grantor, operate effectually as a conveyance. *Bigelow, Estoppel*, 338-340; *Thompson, Homestead & Exemption*, 474; *Connor v. McMurray*, 2 Allen, 202; *Barton v. Drake*, 21 Minn. 299; *Conrad v. Lane*, 26 Minn. 389, 37 Am. Rep. 412, 4 N. W. 695; *Justice v. Souder*, 19 N. D. 617, 125 N. W.

1029; *Silander v. Gronna*, 15 N. D. 552, 125 Am. St. Rep. 616, 108 N. W. 544; *Gaar, S. & Co. v. Collin*, 15 N. D. 623, 110 N. W. 81.

Langer & Nuchols, for respondent.

In this state a mortgage of real property is not a conveyance thereof, but is only a lien thereon. Comp. Laws 1913, §§ 6725, 6726.

After-acquired title of mortgagor inures to mortgagee, as of date of mortgage. Comp. Laws 1913, § 6731; *Adam v. McClintock*, 21 N. D. 483, 131 N. W. 394.

A mortgage, containing covenants of title, upon public land belonging to the United States, upon which no homestead entry has been filed, is not void nor in violation of the homestead laws; and if the mortgagor subsequently files homestead entry upon such mortgaged land and acquires title thereto under the homestead laws of the United States, such interest inures to the benefit of the mortgagee as of the date of the mortgage. *Kirkaldie v. Larrabee*, 31 Cal. 456, 89 Am. Dec. 205; *Weber v. Laidler*, 26 Wash. 144, 90 Am. St. Rep. 726, 66 Pac. 400.

A mortgage by an unmarried man, valid when given, remains unaffected by the homestead exemption coming into existence by the subsequent marriage of the mortgagor. *Adam v. McClintock*, *supra*; *Helgebye v. Dammen*, 13 N. D. 167, 100 N. W. 245.

A mortgage given by an unmarried woman upon land upon which she had filed a homestead entry, prior to receiving patent, and before she had acquired equitable title thereto, was a valid mortgage, and that the legal title subsequently acquired by issuance of patent inures to the mortgagee as of date of delivery of mortgage, and that such mortgage is unaffected by the homestead exemption thereafter coming into existence by her marriage. *Adam v. McClintock*, *supra*; Comp. Laws 1913, § 6731; *Kirkaldie v. Larrabee*, 31 Cal. 455, 89 Am. Dec. 205; *Weber v. Laidler*, *supra*.

BRUCE, J. (after stating the facts as above). The sole question for the determination in this case is whether a mortgage which is given by an entryman while a single man, and pending a proceeding to cancel a prior homestead entry, and after he has planted a crop on the land, and after the determination of the contest in his favor in the local land office, but before the issuance of the final order by the General Land Office, and before he has actually filed as a homestead entryman under

his preference right, is a valid lien at all; and if a valid lien, a lien against the homestead rights of his wife, whom he married before filing and before the issuance of the order canceling the prior entry by the United States General Land Office, but after the execution of the mortgage, final proof having subsequently been made. We think it is a valid lien.

This case is, indeed, decided by the prior decision of *Adam v. McClintock*, 21 N. D. 483, 131 N. W. 394. In that case we held that a mortgage which was executed by an entryman after filing, but before final proof, was a valid lien, even as against family homestead rights. In that case the homestead entry was made by the wife before her marriage. We held that she was bound by her own covenants, and as far as her husband was concerned "the homestead exemption is dependent entirely upon the estate and interest of the owner thereof, and is subject to her legal and valid contracts. It is secondary to the wife's title and dependent upon it, and cannot exceed the wife's rights or modify the wife's title. . . . The husband, coplaintiff, must base the family homestead exemption upon the wife's title, and he, like the wife, is by the statute concluded by the recorded mortgage imputing notice to him. The homestead exemption could not be given retroactive force in any event, certainly not beyond the time when it could have existed. *The mortgage, being valid when given, remained unaffected by the homestead exemption subsequently coming into existence.*"

It is true that in the case cited the mortgage was given after the filing. We cannot see, however, how that fact in any way changes the rule. If the courts hold, as they seem almost universally to hold, that a mortgage is valid which is given before the mortgagor obtains title by final proof, and relates by statute, § 6731, Compiled Laws of 1913, to the time when originally given, we can see no reason why it should not be considered valid when given pending a contest, and after a decision of the local land office in the contestant's favor, even though before the actual filing of the preference entry. Plaintiffs are precluded from denying the validity of the mortgage, both by estoppel from the mortgage covenants and by the statute as to after-acquired title, § 6731, Compiled Laws of 1913.

The judgment of the District Court is in all things affirmed.

The costs and disbursements of this appeal will be taxed against the plaintiffs and appellants.

ARVID NORDBY v. O. J. SORLIE.

(L.R.A.1917B, 753, 160 N. W. 70.)

Motor cycle— automobile — collision of — damages — action to recover — negligence of defendant.

1. Plaintiff, riding a motor cycle, met defendant driving an automobile, and collided with the rear wheel of the auto just as it was turning out of plaintiff's half of the roadway. Plaintiff recovered a verdict of \$2,500 for alleged negligence of defendant, who appeals.

Held, there is no proof that defendant was negligent.

Negligence — defendant — contributory negligence — plaintiff — recovery — cannot be had.

2. Conceding that defendant was negligent, it is conclusively established by plaintiff's own testimony and by uncontroverted evidence that plaintiff was guilty of contributory negligence barring his recovery.

Finding of jury — plaintiff's negligence — admitted facts — contrary to — verdict not in accord with facts — dismissal of case — should have been ordered.

3. The finding by the jury that plaintiff was not guilty of contributory negligence is contrary to all the admitted facts and to plaintiff's own proof, and cannot be upheld. A directed verdict of dismissal should have been ordered.

Opinion filed November 10, 1916. Rehearing denied December 2, 1916.

Appeal from the District Court of Traill County, *Cooley*, Special Judge.

Reversed and action ordered dismissed.

Henry Leum and *Chas. A. Lyche*, for respondent.

Generally speaking, a person knows and can testify to the fact as to whether or not he was intoxicated at a past given time and place, and to ask him the question is not calling for his mere conclusion. *People v. Eastwood*, 14 N. Y. 562; *Com. v. Eyler*, 217 Pa. 512, 66 Atl. 746, 10 Ann. Cas. 786, and extensive note in 11 L.R.A.(N.S.) 639.

Note.—For rules of the road governing vehicles proceeding in opposite direction, see note in 41 L.R.A.(N.S.) 322, and as to vehicles proceeding in the same direction, see note in 41 L.R.A.(N.S.) 337.

For speed of automobiles as negligence, see notes in 38 L.R.A.(N.S.) 488; 42 L.R.A.(N.S.) 1180, and 51 L.R.A.(N.S.) 993.

The fact that the same or another person to whom defendant is responsible for a similar negligent act showed similar negligence cannot be shown. *Malton v. Nesbit*, 1 Car. & P. 70.

Prior and other negligent acts of the plaintiff cannot be shown. *Edwards v. Ottawa River Nav. Co.* 39 U. C. Q. B. 264; *Southern Bell Teleph. & Teleg. Co. v. Watts*, 13 C. C. A. 579, 25 U. S. App. 214, 66 Fed. 461; *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569; *Little Rock & M. R. Co. Harrell*, 58 Ark. 468, 25 S. W. 117, 11 Am. Neg. Cas. 144; *T. & H. Pueblo Bldg. Co. v. Klein*, 5 Colo. App. 348, 38 Pac. 608; *Lake Erie & W. R. Co. v. Morain*, 140 Ill. 117, 29 N. E. 869; *Chicago, B. & Q. R. Co. v. Lee*, 60 Ill. 501; *Dalton v. Chicago, R. I. & P. R. Co.* 114 Iowa, 257, 86 N. W. 272; *Chicago, R. I. & P. R. Co. v. Durand*, 65 Kan. 380, 69 Pac. 356, 12 Am. Neg. Rep. 29; *Hutcherson v. Louisville & N. R. Co.* 21 Ky. L. Rep. 733, 52 S. W. 955; *Parker v. Portland Pub. Co.* 69 Me. 173, 31 Am. Rep. 262; *Aiken v. Holyoke Street R. Co.* 184 Mass. 269, 68 N. E. 238; *Whitney v. Gross*, 140 Mass. 232, 5 N. E. 619; *Maguire v. Middlesex R. Co.* 115 Mass. 239; *Robinson v. Fitchburg & W. R. Co.* 7 Gray, 92; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99; *Southern R. Co. v. Kendrick*, 40 Miss. 382, 90 Am. Dec. 332; *Newstrom v. St. Paul & D. R. Co.* 61 Minn. 78, 63 N. W. 253, 12 Am. Neg. Cas. 136; *Kennon v. Gilmer*, 5 Mont. 257, 51 Am. Rep. 45, 5 Pac. 847; *International & G. N. R. Co. v. Ives*, 31 Tex. Civ. App. 272, 71 S. W. 772; *Gulf, C. & S. F. R. Co. v. Rowland*, 82 Tex. 166, 18 S. W. 96; *Contra, Galveston, H. & S. A. R. Co. v. Kutac*, 76 Tex. 473, 13 S. W. 327; *Hays v. Gainesville Street R. Co.* 70 Tex. 602, 8 Am. St. Rep. 624, 8 S. W. 491; *Christensen v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018.

Theo. Kaldor and John Carmody, for appellant.

A public highway is open in all its length and breadth to the reasonable, common, and equal use of the people on foot or in vehicles. In using the highways all people are bound to the exercise of reasonable care to prevent accidents and injury. The owner of an automobile has the same rights as the owners of other vehicles. *Christy v. Elliott*, 216 Ill. 31, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 74 N. E. 1035, 3 Ann. Cas. 487; *Hennessey v. Taylor*, 189 Mass. 583, 3 L.R.A.(N.S.) 345, 76 N. E. 224, 4 Ann. Cas. 396, 19 Am. Neg. Rep. 285; *Indiana*

Springs Co. v. Brown, 165 Ind. 465, 1 L.R.A.(N.S.) 238, 74 N. E. 615, 6 Ann. Cas. 656, 18 Am. Neg. Rep. 392; *Fox v. Barekman*, 178 Ind. 572, 99 N. E. 989; *Messer v. Bruening*, 48 L.R.A.(N.S.) 945, and note, 25 N. D. 599, 142 N. W. 158; *Minor v. Stevens*, 42 L.R.A.(N.S.) 1178, note.

Plaintiff was guilty of contributory negligence, and his own negligence was the direct cause of his injury. He exercised no care, according to the admitted facts, and was violating the state law as to speed. *Thies v. Thomas*, 77 N. Y. Supp. 276; *Nadeau v. Sawyer*, 73 N. H. 70, 59 Atl. 369; *McIntyre v. Orner*, 166 Ind. 57, 4 L.R.A.(N.S.) 1130, 117 Am. St. Rep. 359, 76 N. E. 750, 8 Ann. Cas. 1087; *Wright v. Crane*, 142 Mich. 508, 106 N. W. 71, 19 Am. Neg. Rep. 336; *Newcomb v. Boston Protective Dept.* 146 Mass. 597, 4 Am. St. Rep. 354, 16 N. E. 555; *Babbitt, Motor Vehicles*, ¶ 250; *Wolfe v. Ives*, 83 Conn. 174, 76 Atl. 526, 19 Ann. Cas. 752; *Spofford v. Harlow*, 3 Allen, 176; *Butterfield v. Forrester*, 11 East, 60, 103 Eng. Reprint, 926, 10 Revised Rep. 433, 19 Eng. Rul. Cas. 189; *Huddy, Automobiles*, 3d ed. p. 102; *Brooks v. Hart*, 14 N. H. 307; *Clay v. Wood*, 5 Esp. 44, 8 Revised Rep. 827; *Thomp. Neg.* 2d ed. § 1287; *Decou v. Dexheimer*, — N. J. L. —, 73 Atl. 49.

A traveler on the public highway is not with heedlessness to rush into danger because his fellow traveler has wrongfully given him the opportunity to receive an injury. He must use ordinary care to avoid injury that otherwise might result from the faults of others. *Parker v. Adams*, 12 Met. 415, 46 Am. Dec. 694; *Loftus v. North Adams*, 160 Mass. 161, 35 N. E. 674; *Cassedy v. Stockbridge*, 21 Vt. 391.

Proof of unskilful and reckless driving will preclude plaintiff from recovering, if his conduct contributed to the injury. *Peoria Bridge Asso. v. Loomis*, 20 Ill. 236, 71 Am. Dec. 263; *Huddy, Automobiles*, 3d ed. § 79, pp. 101, 136, 156 and 157; *Vesper v. Lavender*, — Tex. Civ. App. —, 149 S. W. 377.

Where an automobile is handled with care, but, on account of the condition of the streets, skids and injures a person, the owner or driver is not liable. *Chase v. Tingdale Bros.* 127 Minn. 401, 149 N. W. 654; *Oxford Hotel Co. v. Lind*, 28 L.R.A.(N.S.) 495, note.

A verdict or decision that, under the evidence, is contrary to the law governing the case, must be set aside; or, if contrary to the weight of

the evidence, must be set aside. *Benedict v. Lawson*, 5 Ark. 514; *Crocker v. Garland*, 7 Cal. Unrep. 275, 87 Pac. 209.

The evidence here is not even sufficiently conflicting to allow the verdict to stand. It is not a question of the weight of the evidence on the part of defendant, but rather a matter of no evidence to sustain the action, or support the verdict. *Malmstad v. McHenry Teleph. Co.* 29 N. D. 21, 149 N. W. 690; *Behling v. Wisconsin Bridge & Iron Co.* 158 Wis. 584, 149 N. W. 486; *Fuller v. Northern P. Elevator Co.* 2 N. D. 220, 50 N. W. 359.

A new trial will always be granted where the verdict is plainly and manifestly against the weight of the evidence. A statute which authorizes a new trial for insufficient evidence confers power to grant a new trial where the verdict is against the weight of the evidence. *McDonald v. Walter*, 40 N. Y. 551; *Inland & S. Coasting Co. v. Hall*, 124 U. S. 121, 31 L. ed. 369, 8 Sup. Ct. Rep. 397; *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 30 L. ed. 1022, 7 Sup. Ct. Rep. 1334; *Fuller v. Northern P. Elevator Co.* 2 N. D. 220, 50 N. W. 359; *Reynolds v. Lambert*, 69 Ill. 495; *Fox River Mfg. Co. v. Reeves*, 68 Ill. 403; *Blake v. McMullen*, 91 Ill. 32; *Reid v. Colby*, 26 Neb. 469, 42 N. W. 485; *Comp. Laws* 1913, § 7660.

Goss, J. Assignments upon refusal to direct a verdict challenge the sufficiency of the evidence to sustain a \$2,500 verdict against defendant as damages from a motor cycle and automobile collision.

Defendant resides at Buxton. On Sunday, July 12, 1914, with his family he went by automobile 18 miles to Mayville, where a Chautauqua was being held. He left Mayville for home about 6 p. m. Two other autos, driven by Knudson and by Gunderson, left just ahead of Sorlie, running in that order. They met plaintiff coming on his motorcycle, 6 miles out. They were going east and plaintiff west. Less than a mile intervened between the lead machine of Knudson's and Sorlie's automobile. Plaintiff met and passed the autos of Knudson and Gunderson, overtook and passed a team, and then met and collided with Sorlie's machine. Plaintiff broke his leg, necessitating its amputation.

At the place of the accident the main traveled roadway ran to the extreme left and north side of a wide crowned but somewhat rough highway. From ditch to ditch the driveway was wide enough for three

rigs abreast, but the traveled roadway ran well to the north side, with ruts worn in by travel to a depth of $1\frac{1}{2}$ inches, as estimated by plaintiff's witnesses, to $3\frac{1}{2}$ inches according to defendant's measurements. Seeing plaintiff coming, defendant endeavored to turn out of the ruts, but succeeded in getting only his front wheels out, while the rear ones remained in them, sliding along, but not mounting the rut so as to carry the rear of the machine over to the right, clearing plaintiff's half of the roadway. Seeing Sorlie turning out, plaintiff assumed that the auto would be out of the north track of the roadway, until too late to avoid striking the rear wheel.

Plaintiff assumes (1) that Sorlie was negligent in being upon the left side of the highway (although within the traveled roadway) instead of upon the untraveled right side of the highway; and (2) in not having his machine under control because of alleged high speed at which plaintiff claims Sorlie was traveling. Sorlie asserts that he had a right to be where he was, exactly in the route of ordinary travel, and hence was not negligent; and also that he was not driving at more than 15 miles an hour at the time, and was not negligent in any way, but was doing his utmost to get out of plaintiff's way when plaintiff dashed into his rig. And Sorlie claims that the uncontradicted testimony establishes conclusively that plaintiff caused his injury by his own contributory negligence in failing to slacken his speed or control his motor cycle while attempting to pass defendant at a high and excessive rate of speed.

The first contention that defendant was upon the wrong side of the highway, and that negligence based upon that fact alone can be assumed, is untenable. While the highway to the south might have been traveled had it been necessary to do so, it was not the generally traveled roadway, otherwise the ruts would not have been worn. The remainder of the highway was practically untraveled. As defendant was but traveling where all others drove, he was only doing what all others had done, and therefore could not have been negligent in merely following that roadway instead of a rougher one elsewhere. The very definition of negligence imports a departure from the usual conduct of the ordinarily prudent individual. And as Sorlie, in doing what he was and what others generally had done, was not departing from that standard, but instead only following it, the assumption of negligence assumed by plaintiff at the outset is erroneous and unsound.

Illustrative of this, the brief reads: "The defendant kept to the *left* in violation of the law of the road, and was following the spur next to the same ditch at the time of the collision. The plaintiff was on the right side of the highway, but the defendant was on the *wrong* side." He has the words "left" and "wrong" italicized to emphasize their importance. For reasons stated, defendant was not on the "wrong" side of the highway, but was where he had a right to be, without any imputation of negligence being drawn from the fact that he was in the traveled roadway upon that portion of the highway. The jury should have been instructed as a matter of law that defendant was not negligent in being in the traveled roadway upon the highway.

And now to examine the other alleged negligence of defendant, and the contributory negligence charged against plaintiff. The two may best be considered jointly under a recitation of all the facts in evidence bearing on them.

Plaintiff had left Hillsboro at 6 or a quarter to 6 at approximately the same time that Sorlie and accompanying autos had left Mayville. During the time intervening before the collision plaintiff had run 16 miles. Sorlie had gone between 5 and 6 miles during the same period. Comparing distances and elapsed time, plaintiff must have traveled nearly three times as fast for that period as Sorlie had traveled. Plaintiff had gone north from Hillsboro through Taft and Cummings, going a mile out of his way and back between the latter place and the highway bearing straight into Mayville, a mile and a half ahead of the place of collision. His undisputed record of achievement of speed and its consequences from the time he left Hillsboro is in evidence. He met or passed half a dozen rigs and automobiles on the trip before the collision, and in every instance the drivers met or overtaken took to the ditch because of the excessive speed at which plaintiff came down upon and passed them. This is undisputed. The nearest plaintiff comes to contradicting it is that he did not notice or observe who he met or where they went.

Plaintiff testifies that he had a drink of whisky at 10 o'clock that forenoon; and that he had been to a beer party a mile out of Hillsboro until just before supper. He admitted having drank at least four glasses of beer and might have had five, as a keg of beer was on tap all that afternoon.

The first party Norby met a mile and one-half or 2 miles north of Hillsboro on this eventful motor cycle ride was O. A. Hong, who was driving south in an auto. Here the first significant fact appears. Plaintiff approached and passed in the wrong track. Hong testifies: "I swung into the ditch on the east side to get out of his way. He was coming on the west side all along. It was around 6 o'clock or possibly a few minutes after 6. I am not sure what time, but it was a little late for supper." "He was going at a pretty fast speed, did not give me any road, held the track on the west side of the road; I saw it was pretty fast speed, so I drove into the ditch to be sure I would clear him, and he went past me pretty fast." The uncontroverted proof shows that at this particular point he was not only speeding, but coming on in the wrong track, where he did not belong. Had he collided with Hong, the latter would have been exonerated by plaintiff's contributory negligence.

He next met Holtz and Odegard, the latter driving, and this second machine, quoting Odegard's testimony, "went into the ditch. I had to go as far as I could to the west side of the road to give him the east side; happened to notice him coming and that he was going rather fast." Holtz, riding with Odegard, says they remarked about plaintiff's speed, and that Odegard said: "Look at that fellow coming." This statement clearly admissible was erroneously stricken out as hearsay. It was a part of the facts of the trip, the *res* under investigation. That the statement was made strongly evidences the unusual.

Holtz continues:

"Well, he come up the road tearing, and Odegard turned out for him, of course, in the ditch as far as he could get, and he come along the road just in this shape.

Q. Swinging back and forth?

A. Yes, and he was coming pretty fast, going from one side of the road to the other, as he was coming towards us.

Then plaintiff approached Dr. Knudson's auto, Gunderson's auto, Tolsby's team, and Sorlie's auto, all four rigs strung out behind one another, and with Knudson's in the lead. The drivers and the occupants of all these rigs all agree that in every instance plaintiff did not

slacken speed, but came down upon them and whizzed by them until he collided with the last car. Knudson noticed plaintiff coming a half mile east before he turned the corner, and had a good opportunity to observe and judge of the speed at which plaintiff was approaching him. Knudson had driven cars for nine years, and, when asked the question, "From your experience in driving motor vehicles state to the jury your best judgment as to how fast this man on the motor cycle was coming at the time he passed you?" replied: "Well, it wasn't less than 40 miles an hour."

Q. Did he slow up when he approached and passed your car?

A. No, sir.

Q. He went by apparently at the same speed as when he was far ahead of you?

A. Yes.

Mrs. Knudson says, "He came pretty fast; we turned out for him; he came pretty fast, I could hardly see him," and just as he went by she exclaimed, "Oh my! he goes fast."

Oscar Hanson, riding in the front seat of Dr. Knudson's auto, testifies that his best judgment as to plaintiff's speed when he passed their car was "from 40 to 45 miles an hour."

Q. Did he seem to slow up as he approached your car?

A. No, he kept the same gait.

Q. State what you did as you approached him.

A. The doctor swung his car on the right into the ditch.

Q. Did you notice any exclamation by any one of those in the car as he passed you?

A. Yes, Mrs. Knudson hollered, "Oh my!"

Geo. Gunderson was driving some distance behind Knudson and ahead of Sorlie and also east of Tolsby's team. He had driven autos for two years. He says that "as he passed me I turned out in the ditch and he went past me pretty fast."

Q. At the time he approached you, as you met him, state whether or not he slowed up any.

A. He did not slow up.

Q. Was he using the same speed when he passed you, as far as you could tell, as he used when he was some distance ahead of you?

A. It looked that way.

Q. State whether or not you were off the traveled part of the road as you passed him.

A. Yes, I went off the road entirely.

Q. Did this man on the motor cycle make any attempt to turn out of the road or not?

A. No.

Gunder Ashiem, riding in Gunderson's car, gave similar testimony as to the way plaintiff approached and passed, and states as his best estimate of the speed at which plaintiff passed their rig immediately ahead of Sorlie's as "about 60 miles an hour," and that he didn't slow up. When asked, "What is the lowest you are positive he was running?" answers, "The lowest was about 40 miles, but I think he went 60, that is my honest opinion."

Carl Vigestrang, also riding in Gunderson's machine, likewise places plaintiff's speed at from "60 to 65 miles an hour," and adds, "When he passed our car, I looked back; I thought possibly he might take a tumble, he went so awful fast."

Plaintiff next overtook and passed Anton Tolsby going toward Mayville and only a short distance ahead of the point of collision. He also got off the road. He says: "I turned right out, right out through the ditch;" and that plaintiff in going by him "went pretty fast and I should judge 35 or 40 miles an hour, just right close to the horses. He kept the road and made no attempt to give me any room or turn out."

Sorlie was asked to describe the circumstances preliminary to the collision and replies:

Just as the motor cycle got over the rise and as soon as I distinguished what it was I started to turn out of the rut,—I was in the rut, and I got the front wheels out of the rut, but the hind wheels slid in the rut and I could not get them out, and before they got out he was there and struck the hind end of my machine.

Q. He passed the front of your machine safely?

A. Yes, the front was out, I got that out, and if the rest of the machine had gotten out when the front part came out, we would have been out to clear the man easily.

That a few hundred feet ahead was a depression, the lowest part of which was over 8 feet below the level of the road leading to it upon which was Sorlie. There is a plat in evidence, made the next day by Sorlie and another, assisted by one of the defendant's present attorneys, made as a precautionary matter. The main general facts therein stated are not denied by plaintiff. It shows that the roadway in which was the auto was 15 feet upon the highway from the bottom of the so-called north ditch, and that 32 inches from the outside rut over toward the ditch the crowning portion of the highway had lowered only 2 inches from what it was at the edge of the roadway; and $5\frac{3}{4}$ feet or nearly twice as far toward the ditch it was but 3 inches lower than the traveled roadway. All witnesses except the plaintiff, including plaintiff's own witnesses, agree that there is no sudden drop or depression between the outer rut on the north side and the ditch on that side. And plaintiff testifies only from his impressions made hurriedly in his approach to Sorlie or while trying to pass. The measurements show the ditch to be only 17 inches deep, or a drop of only that much in the 15 feet from the north rut to the edge of the highway. The measurements actually taken tend to establish that plaintiff had ample room to pass without going into the ditch or even getting close to it, had he gotten out of the rut on that side.

Plaintiff testifies that his motor cycle that day "was running, but it wasn't running right; there was something wrong with the cylinders; it kind of bound in the cylinders." That he left Hillsboro "about 6 o'clock, or a little before;" he describes his route; was going "at the time of this accident I think about 15 or 18 miles an hour."

Q. And can you tell and give the jury an idea about how fast the auto driven by Sorlie was going?

A. No, I hardly can, it seemed it was a good speed, I can't say how fast it was [That he] was riding along on the right side till I met this fellow Sorlie.

Q. Tell the jury how it happened.

A. Well, just when I met him he was just turning the front wheels a little I guess.

Q. Do you remember the collision, do you remember coming together there?

A. Yes, just when we struck, just before the accident he turned his front wheels out of the rut or tracks where the front wheels were to the south of the road. [He had no speedometer on his motor cycle.]

Q. I want to ask you just how close to the traveled part of the road, the part of the road used for the wagons, was the north ditch?

A. There was just a few inches.

Q. About how many?

A. Probably a foot or so.

Q. Now I want to ask you if there was a traveled portion to the south, —was there a road traveled over south?

A. It looks to have been traveled there, but not so much as on the other side.

Q. Where was the road the smoothest on the north track or on the south track?

A. The north track.

Q. When you saw this man on the north side of the road, the same side that you were on, why didn't you stop your motor cycle?

A. *Of course I expected him to turn out the same as them others did.*

Q. Well, after you got nearer to him and saw he wasn't turning out, why didn't you stop your car (meaning motor cycle)?

A. *I never had time to stop, and then, of course, he was coming awful fast and struck me like a bullet.*

Q. Why didn't you get in the ditch?

A. The ditch was kind of deep on the north side. It was near square up and down, and *I probably would kill myself to go out there.*

Q. How far was your motor cycle from the ditch, as you were going along?

A. As close to the ditch as I possibly could.

Q. And you couldn't get by the machine?

A. No.

Q. Were you going as fast when you met Sorlie as you were when you met Dr. Knudson?

A. Of course, I see—I thought that—I *didn't think he could control his auto and when I saw that I turned the gasolene off, but it was too late.*

Q. Turned it all off?

A. Yes, *but it was too late to do anything, of course, I couldn't do anything to save myself then before the strike.*

The foregoing is all in response to his own counsel.

On cross-examination he testifies:

Q. Was there sufficient room there for you to pass if you had turned to the left of Sorlie's machine, as you wanted to?

A. Well, if I turned right away when I passed the second automobile.

Q. What is that?

A. When I passed the second automobile I probably could, *but I expected him to turn the same as everybody does till it was too late.*

As corroborative of plaintiff's statement that he was going at a low speed, he has offered the testimony of Johren, who saw plaintiff from a distance of a quarter of a mile, half a mile from the place of collision, and who says that his "best guess" was that when witness saw plaintiff, the latter was making 18 or 20 miles an hour. Dunley, who had repaired the motor cycle sometime before, said he had reduced the speed of it somewhat to take a knock out of it, so that it did not go as fast as a new one, but that he couldn't tell what speed it would develop. And one Lerum also testified that the north rut was $1\frac{1}{2}$ inches or so deep and only about a foot from the ditch on that side. This fairly and accurately states the testimony upon which the jury found that Sorlie was negligent, and that his negligence contributed to plaintiff's injury, and that plaintiff was not guilty of contributory negligence.

It is impossible to read the record without coming to the conclusion that the facts were that plaintiff was running at a high rate of speed from Hillsboro to the scene of the accident, and with little regard to his own safety or the safety or rights of others. Without exception, every rig he passed went into the ditch to avoid him. It is significant also that everybody he met noticed that Nordby was going "awful fast," and that several of them remarked about it; and that all agree that at no time did he slow up as he approached, but "whizzed" by at full speed. The distance that he had come in the elapsed time is corroborative proof of sustained excessive speed. He does not claim to have turned out or slowed up, not even in meeting Sorlie, except, as he says, "when it was

too late;" and that he claims was because of Sorlie's speed, not his own. If plaintiff was insensible to his own speed, it was but natural for him to believe that Sorlie, and not himself, was speeding. But had he struck any other of the half dozen rigs he passed before colliding with Sorlie, under the proof he would have been guilty of contributory negligence as a matter of law. And that he was making no exception as to Sorlie is proven by his own statement that he expected him to get out of the way "as them others had done." An accident prevented Sorlie from being out of his way. The condition of the road kept him in the way, and plaintiff dashed into his rear wheel. The physical, admitted, and uncontroverted fact that he safely passed the front wheel and the side of the auto and struck the hub of the hind wheel demonstrates that the auto must have been attempting to get out of the rut, and must have been standing at considerable of a diverging angle to his roadway. This corroborates Sorlie and is substantiated by plaintiff's own testimony that he saw Sorlie turning the front wheels out of the ruts. Sorlie in this position must have been going slow, or, as he says, he would have been out of the roadway or overturned.

Eliminating, as we must, the fact that Sorlie was on the north side of the road, the proof discloses that he did nothing negligent, neither did he omit to do anything that a reasonably prudent man could have done to avoid the accident. Admitting for the sake of further analysis plaintiff's testimony that Sorlie appeared unable to control his machine and because thereof was negligent, and that the same contributed to the accident, nevertheless under the undisputed facts and every reasonable inference therefrom, and from plaintiff's own testimony and admissions, plaintiff was guilty of want of control and therefore guilty of contributory negligence. He says he made no attempt to get out of the rut, and the only reason he gives for it was, "I probably would kill myself to go on there;" i. e., to his right and into the ditch, which he says in the same breath "was pretty near square up and down." It can be assumed that the situation in which he had placed himself was a dangerous one, yet the very situation conclusively proves that he had no control over his machine. When he had shut off the gasoline, he was too close to the approaching automobile to avoid collision. It is a self-evident fact that had he been in control and using the degree of care required of him, he with safety could have either run his machine into

the ditch or have alighted therefrom. That he could do neither establishes his negligence when attempting to pass the approaching vehicle. The condition of the road or its ruts does not alter his duty to use care. The statute means what it says in § 2976L, Comp. Laws 1913, that "no person shall operate a motor vehicle on the public highways at a rate of speed greater than is reasonable and proper, *having regard to the width, conditions and use of the highway at the time* and the general and usual rules of the road, or so as to endanger property or the life or limbs of any person." Plaintiff was bound to regard the width, condition, and *use* made of this highway at that point, as well as the rules of the road, and could not without negligence on his part rely entirely upon Sorlie's getting out of his track "the same as them other ones had done" all the way from Hillsboro there. He could not expect others to have more regard for his safety than he had himself. It was his duty to have his machine under control when passing.

True, it was Sorlie's duty to use reasonable diligence to obey the rules of the road and clear for the plaintiff the north pathway of the roadway. But the law does not make Sorlie an insurer of his ability to do so, as "the width, condition, and use of the highway at the time" are to be considered with the rules of the road in that respect.

To hold otherwise would make him an insurer against the results of unavoidable accident, as well as culpable negligence of the approaching party, and announce a rule of law that would permit an approaching vehicle like plaintiff's to dash ahead at full speed reckless of road conditions, with the other party an insurer against such recklessness. The duties owing by each driver toward the other are reciprocal, equal, and alike, with no advantage of one over the other, under the law and the rules of the road. It is clear from plaintiff's testimony that he failed to realize that he owed any such reciprocal duty to Sorlie, but instead assumed that the latter must get out of his track in any event and would do so, and that he was excused from exercising any care for his own safety. Plaintiff was bound in law to be in a position to allow Sorlie time to get out of his track, as admittedly he was endeavoring to do. If plaintiff's recovery can be sustained under this proof, it is hard indeed to conceive of such a case where a recovery would not be upheld. When, from out of plaintiff's own mouth, accompanied by the unquestioned and undenied proof of his previous and almost contemporaneous

successive acts of culpable negligence establishing his wanton recklessness for the entire trip until he struck Sorlie, and when he might have received the same injury from any of the others had it not been for their exercise of undue care toward him, coupled with the reasonable probability that his conduct was the result of a mind more or less dulled into insensibility of speed or danger from the admitted use of a considerable amount of intoxicants that afternoon together with as nearly conclusive proof by Sorlie that he did no act upon which negligence could be based as can in ordinary probability usually be established by proof,—when all of this is considered, to affirm this recovery is to close one's eyes to every reasonable probability and established fact, and, because a verdict has been found, announce a precedent that will in practical effect make every automobile driver or owner, at the whim of a careless jury, the absolute and unqualified insurer against, not his own negligence, but that of every vehicle that attempts to pass another in however a negligent manner. It is true that a jury has passed upon the facts, but it is equally true that in doing so it must have closed its eyes to the facts and any and all reasonable inferences from them.

And the paucity of plaintiff's proof as set forth in his own brief well illustrates the extreme to which plaintiff's counsel has been driven in his attempt to uphold this verdict and establish his major premise that *all* the evidence without contradiction does not favor defendant. He calls attention to what he claims was the fact that "plaintiff had no difficulty in meeting or passing vehicles on the highway, other than the defendant's auto." The reason is plainly apparent from the proof. Of course *he* did not, because, under the uncontroverted proof, every vehicle without exception took to the ditch in meeting him or when overtaken by him. He says "his motor cycle was not in condition to develop speed on that day." To find this to be fact would ignore the established fact that plaintiff had gone more than twice as far as Sorlie in the same length of time, as well as also to overlook the testimony of ten witnesses estimating plaintiff's speed immediately preceding the accident (and all of which testimony is undenied by plaintiff himself) variously at from 35 to 65 miles an hour, and corroborated by contemporaneous occurrences and remarks made.

And in the same way plaintiff's statement that he was not riding to exceed 15 or 18 miles an hour on meeting Sorlie is condemned as untrue

by the facts surrounding the accident, and that he failed to alight or turn out, and thus avoid injury. It was impossible for Sorlie to have been going at an excessive speed from the admitted position of his auto, partly in the ruts and partly out, when plaintiff was approaching, immediately preceding as well as at the time of the collision, also disposing of plaintiff's testimony that defendant was coming "awful fast" and "struck him like a bullet." The comparison was misapplied; plaintiff was the bullet.

Plaintiff lays emphasis upon the proposition that questions of credibility were for the jury, and has attempted to discredit about all of defendant's witnesses by reason of friendship, acquaintance, or association with Sorlie. Of course, credibility was for the jury. But the main and decisive facts are out of the mouth of the plaintiff or stand admitted.

When the motion for a directed verdict of dismissal was made at the close of the case with the entire history of plaintiff's trip that day in evidence and undenied, taken with plaintiff's own testimony, there was no issue for the jury upon whether plaintiff was guilty of contributory negligence. A finding that he was not guilty of contributory negligence cannot be upheld. The case should have been dealt with accordingly. The judgment and order appealed from is ordered reversed, and judgment of dismissal of this action is ordered.

STATE OF NORTH DAKOTA EX REL. HENRY J. LINDE,
Attorney General, Rep. Relator, v. JAMES E. ROBINSON, R.
H. Grace, L. E. Birdzell, Chas. J. Fisk, E. B. Goss, and E. T.
Burke.

(160 N. W. 512.)

Supreme court — prerogative jurisdiction — questions involved — publici juris — sovereignty of state — franchises — prerogatives — liberties of its people.

1. The prerogative jurisdiction of the supreme court will be exercised only in cases wherein the questions involved are *publici juris* and the sovereignty of the state or its franchises or prerogatives or the liberties of its people are affected.

Supreme court — members thereof — majority of — general election — successful candidates — controversy — public interest — sovereign rights of state — original jurisdiction — exercise of.

2. A controversy between a majority of the present members of the supreme court and certain successful candidates at the last general election who claim the right to occupy such offices and exercise the duties thereof, presented to this court by the petition of the attorney general, is a matter of such public interest and involves the sovereign rights of the state and its people in a degree sufficient to require the exercise of such original jurisdiction.

District court — judge of — called to sit — supreme court judge — in place of — becomes supreme court justice — for all purposes in case — power — authority.

3. A judge of the district court who is called in to sit in the place of a judge of the supreme court becomes a justice of the supreme court for all purposes in the case in which he is so called, and is invested with the same power and authority conferred upon a justice of the supreme court.

Opinion filed December 7, 1916.

Application for an original writ by Henry J. Linde, Attorney General.

An order is issued citing the respondents to show cause why the writ should not be issued.

PER CURIAM.

The attorney general presented to this court his verified petition in due form wherein it is asserted that the three above-named respondents, Robinson, Grace, and Birdzell, were candidates, and received a majority of all votes cast at the general election held in November, 1916, for the offices of justices of the supreme court of the state of North Dakota, and consequently were chosen and elected as justices of the supreme court to succeed in term Chief Justice C. J. Fisk, and Associate Justices E. T. Burke and E. B. Goss, whose terms commenced on the first Monday in January, 1911, and will expire January 2, 1917; that the above-named respondents, Robinson, Grace, and Birdzell, assert that their terms of office commence on December 4, 1916, and that they threaten and are about to intrude themselves into, and without warrant of law assume, the offices of justices of the supreme court; that they have declared their intention to so do, among other ways, in a written com-

munication to the present Chief Justice Fisk; and that they will, unless restrained from so doing, intrude themselves into, and attempt to occupy, said offices and perform the duties thereof, as well as enter into possession of the offices in the State Capitol now occupied as chambers by Chief Justice Fisk and Associate Justices Burke and Goss, respectively.

The petition also sets forth at great length the important causes (including criminal cases) now pending before said court; the uncertainty which will exist respecting the validity of the judgments and orders of the court, and in general the condition of chaos which will exist under the circumstances, unless some orderly determination be made of the rights of the respective contenders. The attorney general, therefore, asks that this court assume original jurisdiction and determine the matters thus presented.

Upon the presentation of this petition to the court it became immediately apparent that the present Chief Justice, C. J. Fisk, and Associate Justices Burke and Goss, were disqualified, as it involved directly their tenure of office and their right to occupy their respective positions and receive compensation for their services during the month of December, 1916; said three members of this court therefore announced their disqualification. The two remaining justices, Bruce and Christianson, thereupon, under the provisions of § 100 of the state Constitution, called three district judges; to-wit, W. L. Nuessle, Judge of the Sixth Judicial District, J. M. Hanley, Judge of the Twelfth Judicial District, and Chas. A. Pollock, Judge of the Third Judicial District, to sit with said Justices Bruce and Christianson upon the hearing of said application. The said district judges so called thereafter met at the court rooms of the court in the State Capitol with Associate Justices Bruce and Christianson, and the court was organized, consisting of A. A. Bruce, Acting Chief Justice, Associate Justice A. M. Christianson, and District Judges, Nuessle, Hanley, and Pollock.

The first question presented to this court as thus organized is whether this court should exercise its original jurisdiction. The original jurisdiction of this court, which is granted by § 87 of the state Constitution, is reserved for the use of the state itself when it appears to be necessary to vindicate or protect its prerogatives or franchises or the liberties of its people. "The state uses it to punish or prevent wrongs to itself or

to the whole people; the state is always the plaintiff, and the only plaintiff, whether the action be brought by the attorney general, or, against his consent, on the relation of a private individual under the permission and direction of the court." State ex rel. Bolens v. Frear, 148 Wis. 456, 500, L.R.A.1915B, 569, 134 N. W. 673, Ann. Cas. 1913A, 1147; State ex rel. Linde v. Taylor, 33 N. D. 76, L.R.A.—, —, 156 N. W. 561.

In State ex rel. Erickson v. Burr, 16 N. D. 581, 113 N. W. 705, this court held that this jurisdiction must be exercised upon the application of a private relator even though the attorney general refuses to consent to the initiation of the proceeding, where a person was appointed by the governor as judge of the district court under a law which provided that such judge should be elected. As already stated, the attorney general refused to institute proceedings, but this court permitted the private relator to file an application, and assumed original jurisdiction, and, upon a hearing, held the appointment to be invalid and ousted the alleged incumbent. In a companion case—State ex rel. Bockmeier v. Ely, 16 N. D. 569, 14 L.R.A.(N.S.) 638, 113 N. W. 711—this court held the acts of the then incumbent to be valid on the ground that he was a *de facto* judge of the district court. If, under these circumstances, the court was required to assume original jurisdiction of the controversy there presented, it is self-evident that in this case, where the proceeding is instituted by the chief law officer of the state and involves the incumbency of the offices of a majority of the members of this court, a far stronger case is presented and far greater reasons exist for assuming original jurisdiction. Consequently, four members of the court as now constituted, namely, Associate Justices Bruce and Christianson, and District Judges Nuessle and Pollock, are of the opinion that this court ought to exercise its original jurisdiction herein, and issue an order citing the respondents to show cause why the original writ of this court should not be issued as prayed for.

Judge Hanley concurs herein, but bases his concurrence on the ground that in this controversy, between two contending courts, a tribunal should be constituted and offered to the contending parties, to settle their differences, to the end that no unseemly controversy be had between the judges as to who has the right to hold the offices involved during the month of December, 1916.

As it appears to the court that C. J. Fisk, E. T. Burke, and E. B. Goss, the present members of this court, are interested in the determination of the questions presented by the attorney general's petition, and therefore are proper parties to this proceeding, it is ordered that they be interpleaded as parties respondent herein. The court therefore directs the issuance of an order citing the respondents to show cause herein why this court should not enter judgment determining the title to said offices of justices of the supreme court, and issue its peremptory original writ confirming the title to said offices in the three respondents who shall be found legally entitled thereto.

As it appears that the determination on the merits of this controversy may affect the tenure of office of Associate Justices Bruce and Christianson, they signify their desires to be relieved from participating in a hearing of the merits of the controversy, if they can be permitted to be so relieved. "It is now a universally recognized principle that a person cannot be a judge of his own cause, and any interest in the subject-matter of a suit will disqualify a judge to preside on the trial thereof. Authority to preside in his own cause cannot be conferred by positive enactment. And however broad the grant of judicial power may be, this rule remains operative, and gives rise to a tacit exception from the general words of the grant. But jurisdiction may be conferred where the interest is not direct, but remote; is not certain and palpable, but contingent and problematical; is not great and important, but minute." 23 Cyc. 576.

The celebrated jurist, Judge Cooley (Cooley, Const. Lim. pages 592, 593), says: "No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule, that Lord Coke has laid it down that 'even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself; for *jura naturæ sunt immutabilia*, and they are *leges legum*.'

"This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation; and when his own rights are in question, he has no authority to determine the cause. . . . Accordingly, where the lord chancellor, who was a shareholder

in a company in whose favor the vice-chancellor had rendered a decree, affirmed this decree, the House of Lords reversed the decree on this ground, Lord Campbell observing: 'It is of the last importance that the maxim that "no man is to be a judge in his own cause" should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest.' 'We have again and again set aside proceedings in inferior tribunals, because an individual who had an interest in a cause took a part in the decision. And it will have a most salutary effect on these tribunals when it is known that this high court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. *This will be a lesson to all inferior tribunals to take care, and not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence.*' "

That the interest of Justices Bruce and Christianson is not so direct as to disqualify them from participating in the merits of this controversy is supported by very high authority. See *Re Duncan*, 139 U. S. 449, 35 L. ed. 219, 11 Sup. Ct. Rep. 573, 23 Cyc. 579.

But in this state the justices of this court have refrained from sitting (even though not legally disqualified) in causes wherein it might appear that they had any interest whatever. Thus in many states trial judges subsequently elected members of appellate courts are permitted to, and do, sit in review upon their own judgments. 23 Cyc. 588, 589. This, however, has never been done in North Dakota. This court has constantly recognized not only the duty of rendering righteous and honest judgments; it has also recognized that "next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge." *People ex rel. Roe v. Suffolk*, 18 Wend. 550.

This declaration has met with the approval of many American courts. See *Conant's Appeal*, 102 Me. 477, 120 Am. St. Rep. 512, 67 Atl. 564. Consequently, while Justices Bruce and Christianson are not legally disqualified from participating in a hearing and determination of the merits of this controversy, it is the unanimous opinion of the entire court, as now constituted, that, in order to comply with

the highest principles of the ethics of the bench, they should be excused from so participating, if they can be legally permitted to do so.

The three district judges participating in this decision were called in under the provisions of § 100 of the state Constitution, which reads: "In case a judge of the supreme court shall be in any way interested in a cause brought before said court, the remaining judges of said court shall call one of the district judges to sit with them on the hearing of said cause."

It will be observed that this constitutional provision was enacted for the sole purpose of providing for the calling in of a district judge to sit in place of any justice of the supreme court who might for any reason be deemed disqualified. In other states having no such constitutional provision, the members of the supreme court have sometimes felt impelled to act in cases wherein they were all directly interested in the controversy. Self-evidently, a condition of that kind is unfortunate, and the framers of our Constitution wisely provided against its occurrence. Very few states have similar constitutional provisions. Its purpose was obviously to preclude the necessity of any controversy presented to the North Dakota supreme court being determined by a court any member of which had an interest in its determination.

In the Constitutional Convention it was first proposed to provide against this contingency by the following provision: "Whenever all or a majority of the judges of the supreme court shall from any cause be disqualified from sitting in any case in said court, the governor shall, with the advice and consent of a majority of the senators elected, assign judges of the district court not disqualified in the manner aforesaid, who shall sit in such case in place of such disqualified judges, with all the powers and duties of judges of the supreme court." See page 97, Journal Constitutional Convention. The provision thus proposed was not adopted, but § 100 of the present Constitution adopted in its stead.

The question, therefore, arises, Can a majority or all of the members of the court consist of district judges? We think it can.

In the early history of the state, the court was required to place its interpretation upon this section of the Constitution, in the case of Northern P. R. Co. v. Barnes, 2 N. D. 310, 51 N. W. 386. Two members of the supreme court, as then constituted, were disqualified, and two district judges were called in to sit in the places of the judges so

disqualified. The decision of the court in that case was promulgated by the two district judges, with the then Chief Justice Corliss, dissenting from the conclusions reached by the district judges, who constituted a majority of the court.

In the case at bar, therefore, the court, as now constituted, consisting of three district judges and two justices of the supreme court, the three district judges constitute a majority and clearly are justices of the supreme court of this state for the purposes of the present controversy, and they are invested with the same power and authority as, and their judgment is entitled to the same force and effect as that of, the justices regularly elected members of the court. Consequently, even though Bruce and Christianson do not participate in the hearing of the present controversy on its merits, the three district judges will constitute a quorum of the court as now constituted, and as such are empowered to transact business under the provisions of § 89 of the Constitution as amended by article 10 of the Amendments thereto.

Therefore, we have decided that Justices Bruce and Christianson ought to be relieved from participating in the hearing of the merits of this controversy unless the contending parties insist upon their participation, and that two additional district judges ought to be called in to sit as members of this court for the purpose of such hearing and determination.

STATE OF NORTH DAKOTA EX REL. HENRY J. LINDE,
Attorney General, Relator, v. JAMES E. ROBINSON, R. H.
Grace, L. E. Birdzell, Chas. J. Fisk, E. B. Goss, and E. T.
Burke.

(160 N. W. 514.)

Members of supreme court — district judges — when called by — acts — powers — same as though elected and acting justices.

1. District judges, when called by members of the supreme court, upon reporting for duty, are clothed by the Constitution with all the powers of justices of the supreme court, to the same extent as though they had been regularly elected and qualified to fill such positions.

35 N. D.—27.

Canons — interpretation — construction — Constitution.

2. Certain well-known canons of interpretation and construction of the Constitution announced and followed.

Territorial enactments — brought forward — laws of state — become such — constitution — adoption of — state officers — terms of — commencement of — supreme court — judges — those first elected.

3. Territorial enactments were by the Constitution carried forward and became the law of the state of North Dakota. The Constitution was adopted in view of a general statute of the territory, § 10, chapter 9, of the Code of 1877, which, by its terms, fixed the date of the commencement of the terms of all state officers upon the first Monday in January, succeeding their election.

Constitution — tenure of office — reference to — supreme court judges — only to those first elected.

4. The reference in § 92 of the Constitution to the tenure of office of the judges of the supreme court and their holding such offices from the first Monday in December, 1889, had reference wholly to the three judges first elected.

State officers — supreme court — judges are — terms of office — commencement of.

5. Judges of the supreme court are state officers, and all the members thereof, save the first three, begin their terms of office on the first Monday in January following their election under § 678, Compiled Laws, 1913.

Constitution — construction of — supreme court — judges of — usage — unquestioned — long period of time — practical construction.

6. The construction of the Constitution as here declared, while never announced in a contested case, has for twenty-four years been followed by the judges of the supreme court in entering upon the discharge of the duties of their respective offices. This uniform rule of action, acquiesced in without a single exception for so long a period, constitutes a practical construction of the Constitution, which cannot now be avoided.

Courts — judicial notice — of the election of state officers — certificate of election — immaterial — officer — administrative — powers of.

7. The court takes judicial notice of the fact that Judges elect Robinson, Grace, and Birdzell were elected and will be entitled to take their seats on the first Monday in January, 1917. The fact whether or not a certificate of election has been issued to them is therefore immaterial. However, if issued, no administrative officer has power, by giving a certificate to that effect, to cause a term of office to begin prior to the time when so provided by the Constitution.

Opinion filed December 11, 1916.

PER CURIAM:

The above-entitled matter was initiated by an order to show cause issued by the following named persons, constituting the supreme court of the state; viz.; Andrew A. Bruce, as Acting Chief Justice, together with Associate Justice A. M. Christianson, and District Judges W. L. Nuessle, James M. Hanley, and Chas. A. Pollock. At the time of the issuing the order to show cause the question of the right of the supreme court, as thus constituted, to sit, was considered, and upon that question an opinion was written, signed, and filed by the five judges above named. State ex rel. Linde v. Robinson, ante, 410, 160 N. W. 512. The order to show cause thus issued, in substance, required all the respondents above named to appear before the supreme court on Thursday, December 7th, 1916, and present their respective claims with reference to their tenure of office of justices of the supreme court, between the first Monday in December, 1916, and the first Monday of January, 1917. Thereafter Justices Bruce and Christianson, entertaining doubts as to the propriety of their further sitting and deciding upon the merits involved in the proceeding, asked to be relieved from acting, whereupon the remaining members of the court as thus constituted, and without any suggestion from Justice Bruce and Christianson, called to complete the complement of the court W. C. Crawford, judge of the district court of the tenth district and K. E. Leighton, judge of the district court of the eighth district. Upon the return day the court last above named assembled, and, with the exception of Judge James M. Hanley, appeared in the court room of said court as constituting a majority of the supreme court of the state of North Dakota then organized and ready to conduct the business of the same. There were also present John P. French, the marshal of said court, and R. D. Hoskins, the clerk thereof. Court was opened in due form. Upon this matter being called for hearing, Messrs. W. C. Lemke and William Langer appeared specially, as counsel for Messrs. Robinson, Grace, and Birdzell, whom for convenience hereafter in this opinion we will designate as judges elect; James E. Robinson and R. H. Grace appearing also in person; L. E. Birdzell not appearing. The attorney general, H. J. Linde, appeared for the plaintiff, stating the reasons why he had brought the action; and Judges Fisk, Goss, and Burke appeared generally, each for himself respectively, making no objection to the juris-

diction of the court as constituted, each filing his return to the writ and claiming, in substance, that his term of office does not expire until the first Monday in January, 1917. Upon the other hand, counsel for the judges elect, appearing specially, moved that the order to show cause be discharged, for the reason that the court as now constituted was not a court and had no jurisdiction in the matter whatsoever. At this juncture the court was compelled to pass upon the question of jurisdiction. Being of the opinion that there is no question whatsoever but that this court, as now constituted, is a regularly organized and existing court under the Constitution, sitting as the supreme tribunal thereof, we conclude, and so hold, that the motion must be denied. This we do independently of the decision heretofore rendered in this same proceeding, and to which reference has been made. *State ex rel. Linde v. Robinson*, *supra*. We, however, wish it to be understood that we have carefully considered that decision and unanimously concur therein, save and except as to the reasoning upon which Judge Hanley bases his concurrence. Reference to that opinion will fully answer the jurisdictional questions involved herein, without the necessity of embodying the same in these conclusions. It may be appropriate, however, for us to add that we cannot agree with the contention of the judges elect that there is no tribunal in this state which can settle the questions here in dispute. Carried to its logical conclusion, their contention would bring us into that singularly unfortunate state of confusion where one body of men in office claimed the right to sit, and another, not having possession, asserted the same right. The matter would then have to be determined by purely the right of possession, or a recourse to physical force, where the members of the highest judicial branch of the government must settle the disputed question by the arbitrament of arms. Such a humiliating spectacle in civilized society ought not to exist. Clearly, no such lapse of power could have been contemplated by the people of the state of North Dakota when they adopted our Constitution containing its clear provisions with reference to calling in judges of the district court to sit when the judges of the supreme court were for any reason disqualified. This court, as now constituted, is as much the supreme court of the state of North Dakota, as though the members thereof had been elected to that position by the people themselves, for the simple reason that the people in adopting the Constitution said that

the tribunal as now created should be organized in the form in which it is in cases where the duly elected and acting supreme court judges were disqualified.

Upon the whole record, therefore, the sole and only question remaining for decision is whether the term of office of the judges elect commences on the first Monday in December, 1916, or, the first Monday in January, 1917. This calls for an interpretation of certain sections of our Constitution and a construction of the whole thereof in connection with appropriate legislation made prior and subsequent to the creation of our state, and its admission into the Union. Before taking up a discussion of the several sections of the Constitution, it may be appropriate to refer to certain canons of construction, which are so thoroughly settled as a part of the law of the land that their simple statement will be sufficient to show the elementary character they possess. "The object of construction, as applied to a written Constitution, is to *give effect to the intent of the people in adopting it*. In the case of all written laws it is the intent of the lawgiver that is to be enforced, but this intent is to be found in the instrument itself. . . . The whole instrument to be examined." "Every such instrument is adopted as a whole, and a clause which, standing by itself, might seem of doubtful import, may yet be made plain by comparison with other clauses or portions of the same law. It is, therefore, a very proper rule of construction *that the whole is to be examined* with a view to arriving at the true intention of each part." "The rule . . . is *that effect is to be given, if possible, to the whole instrument*, and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory." The purpose to be accomplished by the Constitution or any part of its several parts should be considered and that will shed great light in construing such Constitution. "It is possible, however, that after we have made use of all of the lights which the instrument itself affords, there may still be doubts to clear up and ambiguities to explain." "Among these aids is a contemplation of the object to be accomplished or the mischief designed to be remedied or guarded against by the clause in which the ambiguity is met with. 'When we once know the reason which alone determined the will of the

lawmakers, we ought to interpret and apply the words used in a manner suitable and consonant to that reason and as will be best calculated to effectuate the intent.' "

"The prior state of the law will sometimes furnish the clue to the real meaning of the ambiguous provision, and it is especially important to look into it if the Constitution is the successor to another and in the particular in question essential changes have apparently been made." And finally, as an elementary rule of construction, we note that which is drawn from contemporaneous and practical constructions and "where there has been a practical construction which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which it is not easy to resist." Upon the question of the duty of the citizen in case of doubt, we find the law to be that "whoever derives power from the Constitution to perform any public function is disloyal to that instrument and grossly derelict in duty if he does that which he is not reasonably satisfied the Constitution permits. Whether the power be legislative, executive, or judicial, there is manifest disregard of constitutional and moral obligation by one who, having taken an oath to observe that instrument, takes part in an action which he cannot say he believes to be no violation of its provisions."

The above quotations are taken from Cooley's Constitutional Limitations, 7th ed. chap. 4, beginning at page 70 and ending at page 123.

Keeping these general rules in mind, and before discussing the various sections of the Constitution involved in this controversy, it should not be forgotten that before statehood the territory of Dakota was fully organized and operating under laws which provided ample machinery for carrying on the government as then existing. The first enactment of the legislature touching this question appears at chap. 73, Laws 1875, page 252. That section, however, was amended by the laws which passed into the Revised Codes of 1877, and the section then enacted is found in chap. 5 of the statutes of that year, page 9, at § 10, which reads as follows: "Except where otherwise especially provided, all territorial, district, county, township and precinct officers shall qualify and enter upon the duties of their office on the first Monday of January succeeding their election, or within ten days thereafter." This section, without any change whatsoever upon the propositions here involved,

continued in force throughout all subsequent legislation, both in the territory and state, down to the present time. It appears at § 1380 of the Compiled Laws of 1887, and therefore was in existence at the time of the adoption of our Constitution. It thereafter appeared as § 354, Revised Codes of 1895, and now is found at § 678, Compiled Laws 1913. When the members of the Constitutional Convention met, therefore, and were drafting the several sections with reference to the tenure of offices, they must have done so in contemplation of the several enactments to which reference has just been made. Considering the Constitution as adopted, we find it is made up of what may be called two parts; the Constitution itself, and the schedule which was adopted for the purpose, as indicated in § 1, "that no inconvenience may arise from a change of territorial government to state government." In § 2 we find the following: "All laws now in force in the territory of Dakota, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitations or be altered or repealed." An examination of the entire document will disclose the fact that sometimes there was a failure to clearly differentiate between what ought to have found its way into the Constitution itself, or in the schedule. We have such an instance now before us, where a more orderly arrangement would have placed § 92 in the schedule. We quote the following sections of the Constitution and the schedule, which must receive construction in order to settle the matter here in dispute:

"Sec. 89. The supreme court shall consist of three judges, a majority of whom shall be necessary to form a quorum or pronounce a decision, but one or more of said judges may adjourn the court from day to day or to a day certain.

"Sec. 90. The judges of the supreme court shall be elected by the qualified electors of the state at large, and except as may be otherwise provided herein for the first election for judges under this Constitution, said judges shall be elected at general elections.

"Sec. 91. The term of office of the judges of the supreme court, except as in this article otherwise provided, shall be six years, and they shall hold their offices until their successors are duly qualified.

"Sec. 92. The judges of the supreme court shall, immediately after the first election under this Constitution, be classified by lot so that one shall hold his office for the term of three years, one for the term of five

years, and one for the term of seven years from the first Monday in December, A. D. 1889. The lots shall be drawn by the judges, who shall for that purpose assemble at the seat of government, and they shall cause the result thereof to be certified to the secretary of the territory and filed in his office, unless the secretary of state of North Dakota shall have entered upon the duties of his office, in which event said certification shall be filed therein. The judge having the shortest term to serve, not holding his office by election or appointment to fill a vacancy, shall be chief justice and shall preside at all terms of the supreme court and in case of his absence the judge having in like manner the next shortest term to serve shall preside in his stead. . . .

"Sec. 95. Whenever the population of the state of North Dakota shall equal 600,000 the legislative assembly shall have the power to increase the number of the judges of the supreme court to five, in which event a majority of said court, as thus increased, shall constitute a quorum."

Also paragraphs 15 and 16 of the schedule, together with article 10, paragraph 89 of the Amendments to the Constitution, which read as follows:

"Sec. 15. All officers elected at such election shall, within sixty days after the date of the executive proclamation admitting the state of North Dakota into the Union, take the oath required by this Constitution, and give the same bond required by the law of the territory to be given in case of like officers of the territory and districts, and shall thereupon, enter upon the duties of their respective offices; but the legislative assembly may require by law all such officers to give other or further bonds as a condition of their continuance in office.

"Sec. 16. The judges of the district court who shall be elected at the election herein provided for shall hold their offices until the first Monday in January, 1893, and until their successors are elected and qualified. All other state officers, except judges of the supreme court, who shall be elected at the election herein provided for, shall hold their offices until the first Monday in January, 1891, and until their successors are elected and qualified. Until otherwise provided by law, the judges of the supreme court shall receive for their services the salary of four thousand dollars per annum, payable quarterly; and the district

judges shall receive for their services the salary of three thousand dollars per annum, payable quarterly."

Amendment to Constitution, article 10, § 89. "The supreme court shall consist of five judges, a majority of whom shall be necessary to form a quorum or pronounce a decision; but one or more of said judges may adjourn the court from day to day or to a day certain."

Remembering the canon of construction which requires the court to view these sections, as well as the entire Constitution, as a whole, and especially in view of the preceding legislation existing when these several sections were adopted, we are led to conclude that § 92, with reference to the terms of office beginning the first Monday in December, applied only to the first three judges who were elected, and not to their successors or to any other judges elected under the Constitution, either as originally framed or subsequently amended. The debates in the Constitutional Convention, and the several references to the development of these sections above quoted, show clearly the purpose and intent of the instrument as drafted and thereafter adopted. Any other theory would lead us to impossible conclusions, and would violate the plain terms of the Constitution itself as disclosed by § 16 of the schedule. The Enabling Act granting power to organize the state was passed by Congress and approved February 22d, 1889. That act of Congress provided for the organization of the state governments of North and South Dakota. Under its terms a Constitutional Convention began in North Dakota on the 4th day of July, 1889. It completed its work on August 17, 1889. It will be seen by reading the schedule that all territorial laws were to be kept in force and carried forward, and other adjustments with reference to the machinery of government were made. It is apparent that the scheme of government for the state provided for biennial elections to take place on the even years. Under the old territorial law the judges of the district court met three times a year in banc and constituted the supreme court of the territory. That plan of organization necessarily ceased with the outgoing territorial government, and it became necessary that a supreme tribunal, largely appellate in its jurisdiction, and which was to be composed of persons not elected or acting as trial judges, should be provided for and the tenure of office of the judges thereof begin immediately upon the organization of the state or as soon thereafter as possible. It must be apparent also that

the framers of the Constitution felt that to elect judges of the supreme court for only one year would be highly improper, and that the length of the terms of the first justices should be more nearly in harmony with the general provisions of the Constitution, § 91, which provides for a term of six years and until their successors are duly qualified. It should be noted further that, under the provisions of § 90, such elections must be held at the general elections. In order therefore to harmonize these provisions and give the judges first elected a suitable tenure of office § 92, above quoted, provided that "immediately after the first election under this Constitution" the judges thus elected shall "be classified by lot so that one shall hold his office for the term of three years, one for the term of five years, and one for the term of seven years from the first Monday in December, A. D. 1889." And it must not be forgotten at this point also that under the provisions of § 91 they were to hold their offices until their successors were duly qualified, which in itself would care for any possible lapse as between the time when the term of the first judges should cease and that of their successors begin, under the general provisions with reference to the time when state officers should take their office; *viz*, the first Monday in January after their election at a general election. If there could be any doubt entertained concerning this construction of § 92, that doubt must be set at rest by the plain provisions of § 16 of the schedule, which provides for the time to which district judges shall hold their offices and also all other state officers (and clearly a supreme court judge is a state officer), save and except the first set of supreme judges whose election for three, five, and seven years was provided for by § 92 of the Constitution. This exception shows clearly that § 92 refers wholly to the first three judges elected, and that no provision was made for the tenure of the other supreme court justices in the Constitution, save and except that they should be elected at general elections, to serve six years and until their successors are elected and qualified, thus leaving the question of when the term of office should begin to be determined by the statutes in force from 1877 down to the present time. Any other construction of these several sections would lead us into a state of confusion from which it would be impossible to extricate ourselves. Considering for a moment the claim of the judges elect that they are the successors of these first judges whose terms were fixed to begin on the first Monday of Decem-

ber, 1889, how shall we determine which three of the present supreme bench, composed of five persons, are the successors of the three first named? Clearly this is impossible. It must not be forgotten that under the provisions of art. 10, ratified in 1908, being an amendment to the original Constitution, the supreme court thereafter, under such Amendment, was to consist of five judges. Just prior to the adoption of this amendment the supreme court was then made up of Judges Fisk, Morgan, and Spalding, immediate and remote successors of Judges Corliss, Bartholomew, and Wallin, the first three to be elected. When the bench was reorganized under the new amendment providing for five judges, there were added by appointment Judges Ellsworth and Carmody. The bench as thus made up became a new tribunal in the sense that the body as then composed had five members instead of three, as originally constituted. By appointment Judge Bruce succeeded Judge Morgan, who had recently resigned. At the succeeding election Messrs. Fisk, Goss, and Burke were elected. Who can say which one of these three was a successor to either Judges Corliss, Bartholomew, or Wallin? If the successor idea must prevail, then we find ourselves in a situation where three members of the supreme court hold their offices from the first Monday in December, while the remaining two would hold their terms from the first Monday in January, because it cannot be contended that there is any provision in the Constitution or statutes which state that the term of the two additional justices should begin in December. If we may say that Judge Fisk was the successor of Judge Corliss and that Judges Goss and Burke were the successors of Judges Ellsworth and Carmody, then we find the anomalous condition of one of these justices with his term of office closing in December and the other two closing in January. To follow the matter a little further, how can we determine which one of the three Justices elect, Robinson, Grace, or Birdzell, is the successor of Judge Corliss, and which two are the successors of Judges Ellsworth and Carmody? A simple statement of these propositions shows the absolute impossibility of arriving at any conclusion favorable to the contention of the judges elect in this matter. It would be clearly in opposition to the plain terms of the Constitution and all good reasoning and common sense.

Viewed from another standpoint, we feel constrained to hold, under well-settled rules of construction, that the terms of office of the supreme

judges of this state must begin on the first Monday in January following their election. Ever since statehood this has been the rule followed by all the judges who have sat upon the supreme bench. It is true upon one or two occasions the question has arisen, but in each and every case the incoming judge or judges have acceded to the general idea which prevailed among the members of the supreme court that the term of office begins on the first Monday in January. Here must be invoked the rule that "where there has been a practical construction which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which it is not easy to resist." Such a matter was presented to the Supreme Court of the United States upon one occasion when the right of the members of the Supreme Court to sit as circuit judges was challenged, there being no specific constitutional authority to that effect, and yet for a long period of time they had so acted. Considering that question in the case of *Stuart v. Laird*, 1 Cranch, at page 309, 2 L. ed. 118, the court said: "Another reason [urged] for reversal is that the judges of the Supreme Court have no right to sit as circuit judges, not being appointed as such, or, in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed." Our own supreme court has adopted the same rule when viewing the construction of various acts of the legislative assembly, and the governors. In the case of *State ex rel. Linde v. Packard*, ante, L.R.A.1917B, 710, 160 N. W. 150, they say: "The contemporaneous construction placed thereon by the various administrative officers and boards is entitled to great weight and the acquiescence in and approval of such construction by subsequent legislative assemblies, and chief executives ought to dispel all possible doubt as to legislative intent." See also *O'Laughlin v. Carlson*, 30 N. D. 218, 152 N. W. 675, 8 Cyc. 727, and *Barry v. Truax*,

13 N. D. 139, 65 L.R.A. 762, 112 Am. St. Rep. 662, 97 N. W. 769, 3 Ann. Cas. 191.

Before passing the question of contemporaneous construction, it is well to remember that the legislature, by their own enactment, have placed a construction upon § 92 of the Constitution adverse to the claims of the judges elect. Section 1915, of the Compiled Laws of 1913 provided for the meeting of the canvassing board on the second Tuesday in December following the election. Both the original law and the amendment provide for such canvass subsequent to the first Monday in December. Section 92 of the Constitution is not self-executing. The legislature has provided no method whereby the judges elect can present prima facie evidence of their right to the office on the first Monday in December. By providing for the meeting of the canvassing board, and necessarily the issuance of certificates of election, at a time subsequent to the first Monday in December, they have placed a construction upon this constitutional provision which we cannot ignore. Such an interpretation expressed by the people through their legislature should and does command the highest consideration and respect. So that if based wholly upon the doctrine of contemporaneous and practical construction, we must hold that since the close of the first term of Judge Corliss's office, which occurred about twenty-four years ago, there has been a uniform and practical construction of those constitutional provisions adverse to the contention of the judges elect in this case. We hold, however, that, even without this last reason indicated, from the plain terms of the whole Constitution, considering all of its parts, in connection with the statute in the light of which these sections were framed and adopted, that the term of office of the several judges of the supreme court as now constituted under the Constitution begins the first Monday in January of the year succeeding their election. In so holding we are not considering whether the judges elect have or have not a certificate of election. We take judicial notice of the fact that they have been elected to succeed the present retiring judges at the end of their term of office. Clearly no administrative officer would have the power, by simply giving a certificate to that effect, to cause a term of office to begin prior to the time when so permitted by the Constitution.

During the course of the argument herein James E. Robinson, one of the judges elect, threatened that, upon taking their seats, the judges

elect would put aside and render nugatory the acts of this court as now constituted, as well as those of the court wherein Judges Fisk, Goss, and Burke have taken part since December 4th. Such an unheard-of proceeding probably never before occurred in a court of justice, and we cannot bring ourselves to believe that the remaining judges elect will support any such revolutionary action. Such threat, however, ought not to deter this tribunal from performing its full duty. Without our seeking, a responsibility of the very gravest character has been thrust upon us. It is with the greatest reluctance that we have undertaken to discharge it. Regardless of possible embarrassment to ourselves, we feel it imperative to prevent, if possible, a recurrence of incidents such as have characterized and made necessary this proceeding, both to maintain the dignity and prestige of this court, and to preserve the welfare and good name of this state.

In the foregoing all concur, excepting Judge James M. Hanley, not sitting.

STATE OF NORTH DAKOTA EX REL. ALFRED BRUNETTE
v. CHARLES A. POLLOCK, Judge of the District Court of
Third Judicial District.

(160 N. W. 511.)

Certiorari — writ of — cause — inferior court — officer — board — or tribunal — jurisdiction — exceeded — appeal — none — other remedy — plain — speedy — adequate.

1. Under § 8445, Compiled Laws 1913, a writ of certiorari will not be granted in any case unless the inferior court, officer, board, or tribunal has exceeded its jurisdiction and there is no appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy.

Certiorari — final order — judgment — correctness — review of — remedy — not proper one — appeal available.

2. Certiorari is not the proper remedy to review the correctness of a final order or judgment in a mandamus proceeding, inasmuch as the ordinary remedy by appeal is available.

Opinion filed December 20, 1916.

Application by Alfred Brunette for writ of certiorari.

Writ denied.

A. T. Cole for petitioner.

PER CURIAM.

We are asked by the petitioner herein to issue a writ of certiorari directed to the judge and clerk of the district court of Cass county, requiring them to certify to this court certain records for review. The object aimed at is to obtain the review of a final judgment entered in a mandamus proceeding. It appears that at an election called for the purpose of voting on such question, a majority of the electors of school district No. 40 in Cass county voted in favor of the removal of a school in such district from a certain public schoolhouse to another building within such district, which latter building, it is claimed, is owned and operated by a sectarian society. It is alleged in the petition herein that the petitioner, being one of the directors of said school district, refused to acquiesce in such removal, and that thereafter a mandamus proceeding was instituted in the district court of Cass county, North Dakota, by the other two directors against the petitioner herein as defendant therein for the removal of such school; that issue was joined in such mandamus proceeding, the petitioner claiming that the removal of the school from the school building where the same had been formerly conducted to the building designated by the electors at such election would be a violation of certain provisions of the Enabling Act and the Constitution; that a hearing was had at which evidence was adduced, and the issues formulated were fully tried; and that after such hearing a final judgment was rendered by the district court, in favor of the plaintiffs in such proceeding and against the petitioner herein as defendant therein, commanding the petitioner, as defendant in such proceeding, to permit the removal of the books, desks, and supplies in the said public school building to the sectarian building designated by the electors at the election.

As already stated, the sole purpose of the writ of certiorari applied for is to obtain a review of the final judgment entered in such mandamus proceeding.

Under the laws of this state Comp. Laws 1913, § 8445 "a writ of certiorari may be granted by the supreme and district courts, when in-

ferior courts, officers, boards or tribunals have exceeded their jurisdiction and there is no appeal, nor, in the judgment of the court, any other plain, speedy and adequate remedy."

In construing this provision of the statute in *St. Paul, M. & M. R. Co. v. Blakemore*, 17 N. D. 67, 73, 114 N. W. 730, this court said: "This statutory provision is so plain that its meaning is not open to question. See however *Lewis v. Gallup*, 5 N. D. 384, 67 N. W. 137, wherein this court had occasion to construe and enforce it in accordance with the views above expressed; the court holding that the writ of certiorari is not the proper remedy for the correction of errors of law, the proper remedy being an appeal."

An appeal lies from the judgment in the mandamus proceeding. *Oliver v. Wilson*, 8 N. D. 590, 593, 73 Am. St. Rep. 784, 80 N. W. 757. And there can be no question but that the district court had jurisdiction to hear and determine the matters at issue therein. Because under the provisions of § 103 of the state Constitution, the district courts are invested with original jurisdiction, except as otherwise provided in the Constitution, of all causes both at law and equity, and the district courts and the judges thereof have jurisdiction and power to issue original and remedial writs with authority to hear and determine the same. In fact, petitioner makes no contention to the contrary. The only complaint made by the petitioner is that the district court erroneously decided the questions submitted to it for determination in the mandamus proceeding.

A writ of certiorari does not lie under these circumstances. *Lewis v. Gallup*, and *St. Paul, M. & M. R. Co. v. Blakemore*, *supra*; *State ex rel. Noggle v. Crawford*, 24 N. D. 8, 138 N. W. 2.

Writ denied.

F. B. SCOTT COMPANY, a Corporation, Appellant, v. HENRY SCHEIDT, Respondent, and C. M. Forman and Peter Zink, Garnishees.

(160 N. W. 502.)

Garnishee — plaintiff's right to recover against — defendant's right to recover — predicated upon.

1. Plaintiff's right to recover against the garnishee is predicated entirely upon defendant's right to recover in his own name and for his own use against the garnishee.

Continuing partnership — debt due to — member of firm — claim against — garnishment — cannot be taken by.

2. A debt due to a continuing partnership cannot be taken by garnishment to pay the individual debt of a member of the firm.

Opinion filed December 2, 1916. Rehearing denied December 21, 1916.

From a judgment of the District Court of Foster County, *Coffey, J.*, plaintiff appeals.

Affirmed.

Geo. H. Stillman for appellant.

C. B. Craven for respondent.

CHRISTIANSON, J. The plaintiff instituted a garnishment action in the district court of Foster county against C. M. Forman and Peter Zink, as garnishees, in aid of an execution issued out of the office of the clerk of said district court. The garnishees answered and admitted that they were indebted to the firm of Scheidt Brothers, a copartnership composed of the defendant, Henry Scheidt, and his brother, Lou Scheidt, in the sum of \$219.

The district court thereupon entered an order directing that Lou Scheidt be interpleaded as a party defendant, and thereafter the said Lou Scheidt served his pleading as such interpleader, wherein he set forth that he and his brother, the defendant, Henry Scheidt, were copartners owning and operating a threshing machine, and that in the fall of 1912 such copartnership threshed for the garnishees, and that there is due to said copartnership for said work, the sum of \$219.

35 N. D.—28.

The defendant, Henry Scheidt, also served an answer in the garnishment proceedings wherein he denied each and every allegation, matter, and fact set forth in the affidavit of garnishment, and alleged that the garnishees were not in any way indebted to the defendant, and had no property in their possession or under their contract belonging to him, but that said indebtedness is jointly owned by the defendant and one Lou Scheidt, and hence not subject to garnishment. The answer further alleged that if the garnishees are indebted to the above-named defendant, or have any property in their possession or under their control belonging to him, said indebtedness or property is by the laws of the state of North Dakota exempt from seizure or sale upon execution or attachment or through garnishment by reason of the fact that this defendant is a resident of the state of North Dakota, a married man and the head of a family, and that the total amount of his property, both real and personal, exclusive of his homestead rights, does not exceed the value of the sum of \$500.

The plaintiff, by way of reply to defendant's answer, denied that the indebtedness of the garnishees is the joint property of Henry Scheidt and Lou Scheidt, and alleged that Henry Scheidt is the sole owner thereof; and further denied that the indebtedness was exempt to the defendant under the laws of this state.

The matter came on for trial before the court without a jury, upon the issues as framed by these pleadings. The plaintiff introduced the record of the judgment upon which his execution was issued, and rested. This was the only evidence introduced by the plaintiff. The defendant made a motion for dismissal on account of plaintiff's failure of proof, which motion was granted, and the plaintiff has appealed from the judgment of dismissal.

Under the laws of this state, Comp. Laws 1913, § 7581 the proceedings against a garnishee are deemed an action by the plaintiff against the garnishee and defendant as parties defendant, and all provisions of law relating to proceedings in civil actions at issue are applicable thereto. The plaintiff had the burden of proof, and it was incumbent upon it to establish, by competent proof, facts which would entitle it to recover in the garnishment action.

"Plaintiff's right to recover against the garnishee is predicated entirely upon defendant's right to recover in his own name and for his

own use against the garnishee. Unless the defendant could so recover, neither can the plaintiff." *Shortridge v. Sturdivant*, 32 N. D. 154, 155 N. W. 20; *Petrie v. Wyman*, ante, 126, 159 N. W. 616.

Under the laws of this state, "the property of a partnership consists of all that is contributed to the common stock at the formation of the partnership and all that is subsequently acquired thereby." *Comp. Laws 1913*, § 6389.

And, "the interest of each member of a partnership extends to every portion of its property." *Comp. Laws 1913*, § 6390.

"Each member of a partnership may require its property to be applied to the discharge of its debts and has a lien upon the shares of the other partners for this purpose and for the payment of the general balance, if any, due to him." *Comp. Laws 1913*, § 6393.

And, "all profits made by a general partner in the course of any business usually carried on by the partnership belong to the firm." *Comp. Laws 1913*, § 6406.

A partnership firm is also permitted as such to claim one exemption under the exemption laws of this state. *Comp. Laws 1913*, § 7741.

The answers of the garnishees, of the interpleader, Lou Scheidt, and the defendant, Henry Scheidt, all aver that the indebtedness owing by the garnishees and sought to be garnished constituted the property of the partnership, Scheidt Brothers, and not the property of the defendant, Henry Scheidt.

"According to the weight of authority, partnership credits can in no case be taken by garnishment to pay the individual debt of a member of the firm; at least while the partnership is a continuing one, and there has been no adjustment between the partners." 20 Cyc. 1029. See also *Rood*, *Attachm.* §§ 156-161; *Shinn*, *Attachm. & Garnishment*, § 49.

In discussing the question of attachment or garnishment of partnership property, and the distinction existing between garnishment and attachment in such cases, *Shinn* (*Shinn*, *Attachm. & Garnishment*, §§ 518, 519) says: "There is much diversity of opinion regarding the attachment of partnership property by seizure, as has been already shown. There is also a lack of uniformity in the judicial decisions of different states regarding the garnishment of debts due to copartnerships or individual members thereof. . . .

"Regarding the garnishment of a debt due or property belonging to a copartnership, however, on a demand existing against but one member thereof, the same rules of law will not apply as when the property of a firm is subjected to direct attachment at suit of a creditor of an individual member thereof. The reason for this is that direct attachment may be made and the property not removed or appropriated until all the liens upon it growing out of the partnership relation are discharged, while by garnishment a judgment against the garnishee would, when acquiesced in, divest the copartner of his right and title in and to the property or fund, which cannot be done while the accounts of the copartnership remain unsettled or its debts unpaid, and because garnishment is a legal proceeding and the equitable rights between the garnishee and the defendant cannot be adjudicated therein. A court of law has no right to adjust partnership affairs or appropriate the fund of all for the payment of an individual debt. It is only after all the affairs of the firm have been settled that an individual share of a partner can be taken by process of garnishment and applied to the payment of his individual debt."

Drake (Drake, *Attachm.* 7th ed. § 567) says: "The attachment of a debt due to a copartnership, in an action against one of the partners, is justly distinguishable from the seizure, on attachment or execution, of tangible effects of the firm for the same purpose. Hence we find the supreme court of Alabama holding . . . that partnership property may be sold to pay the debt of one partner, but that a debt due to a firm cannot be taken by garnishment for that purpose. The reason assigned is that in the case of a sale the property is not removed, and cannot be appropriated until all liens upon it growing out of or relating to the partnership are discharged; while in the other case, the judgment against the garnishee, if acquiesced in, changes the right of property, and divests the copartner's title to the property attached, which cannot be done so long as the partnership accounts remain unsettled or its debts unpaid." See also *Trickett v. Moore*, 34 Kan. 755, 10 Pac. 147; *Henderson v. Cashman*, 85 Me. 437, 27 Atl. 344.

There is nothing in the statutes of this state to indicate any intent to change the well-settled rules of law above quoted. The statutory provisions (which we have quoted) rather indicate a contrary intent. The pleadings in this case show that the debt due from the garnishees

herein is due, not to the defendant, Henry Scheidt, but, to the firm of Scheidt Brothers, which firm so far as disclosed is still existent and continuing.

The trial court properly directed a dismissal.

Judgment affirmed.

**JOSEPH SEMERAD v. DUNN COUNTY, a Municipal Corporation,
and the Board of County Commissioners of Dunn County.**

(160 N. W. 855.)

Words — “any action” — Compiled Laws — county commissioners — actions of — questions presented — petition — highway — establishing — proceedings — notices — posting.

1. The words “any action” which occur in § 1924, Compiled Laws of 1913, refer to the action of the county commissioners in passing upon and determining the questions presented by a petition for the establishment of a highway, and, if the petition is posted twenty days before such action is taken by the board, the proceedings will not be nullified merely because such petition was not posted more than twenty days before the notices for the meeting were served and posted by the board.

Board of commissioners — determination of — highways — appeals — damages — objections filed — objector — land of — orders made — collateral attack.

2. An appeal lies in North Dakota from the determination of a board of commissioners both as to the route to be taken and the damages to be awarded in the case of the laying out of a highway under the provisions of §§ 1928 to 1939 of the Compiled Laws of 1913. And if in such a case the land of the objector is sufficiently described and the order of the commissioners covers the land of the objector and the survey is in conformity with the order, and the objector has been properly served, such objector cannot afterwards collaterally attack the regularity of the proceedings or the final determination of the board.

County commissioners — highway — establishing — order on — survey — route — order controls.

3. Where the county commissioners seek to establish a highway and enter an order specifying the route, a survey which is subsequently made cannot vary or alter that route, and the order, and not the survey, must govern.

Highway — route of — description of — particulars — order — void when.

4. Where the county commissioners seek to establish a highway, the route of

such highway must be described in terms which are intelligible to a reasonably intelligent man, and where an order fails in this particular, it will be void and of no effect.

Opinion filed December 21, 1916.

Appeal from the District Court of Dunn County, *W. C. Crawford, J.*
Action to restrain the construction and maintenance of a highway.
Judgment for defendants. Plaintiff appeals.
Reversed.

Statement of facts by BRUCE, J.

This is an action for a permanent injunction restraining the county of Dunn, its board of county commissioners, and all of its other officers from entering upon plaintiff's land for the purpose of constructing or maintaining a highway, and from passing over and across and using same.

The appeal is from an order sustaining a demurrer to the complaint and from the judgment entered thereon.

The complaint in substance alleges that on March the 15th, 1909, a petition was presented to the board of county commissioners and was posted by copies in three places; that on March the 10th, 1909, notice of a meeting to hear said petition was served and also posted in three places; that on May 18th, 1909, the commissioners held a meeting and granted the petition and determined to lay out a highway, describing the same in substantial conformity with the description given in said petition as follows, to wit: "Beginning between sections 31 and 32-142-97, then south and thence east between sections 5 and 32, and sections 4 and 33 and 3 and 34 east, then south between sections 2 and 3-141-97, then on the northeast corner of section 10-141-97, then nearly one-half mile south, then back to section line between 10 and 11-141-97, then between sections 14 and 15, sections 23 and 22 south, then each between sections 23 and 26, then diagonally across the east half of the northwest quarter and then straight east between sections 25 and 30 east, twp. 141, range 97 and 96; that said commissioners then and there made an order therein which is as follows: 'It is therefore ordered and determined that a road be, and the same is, hereby ordered and established according to the description last aforesaid, and it is hereby

declared to be a public highway 4 rods wide, the said description above given being the center of said road; that all of the foregoing is more fully disclosed in a certified copy of the order and other proceedings therein and the whole thereof marked 'exhibit A' attached to and made a part of this complaint."

The complaint then alleged that on the 18th day of May, 1909, said commissioners made an award of damages in said proceedings and allowed \$50 as damages on the northeast quarter of Sec. 22, twp. 141, range 97; that said allowance was the only awarded damage at any time made for any of the lands affected by said road and granted in said order.

It further alleges that the road order made by said county commissioners on May 18, 1909, in the part thereof reciting that a survey had been made and a survey map was attached, is not according to the facts, but is false or assumed, and insufficient; that, on the contrary, a survey therein was caused to be made more than two years thereafter; to wit, July 24, 1911.

The complaint further alleged that the plaintiff is, and at all times herein mentioned was, the owner of the northwest quarter of sec. 25, twp. 141, range 97, and at all times was in open and notorious possession thereon; that aforesaid county commissioners' proceedings embraced the attempt to establish a public highway across plaintiff's aforesaid land, but that said proceedings were and are entirely irregular and insufficient; that said petition did not contain plaintiff's name as owner of aforesaid land, or any description thereof; that no part of aforesaid land was at all, or in any manner whatever, described in said petition as part of, or required for, said road; that said petition and the order of said commissioners did not give an accurate description of the course of the highway to be established, or the point at which it was commenced, or the point where it was terminated; that the diagonal part of said road across plaintiff's aforesaid land is not described in said petition or in said order of said county commissioners by metes and bounds, or at all or in any way sufficient in law; that said road order, together with the other papers in said proceedings, except the award for damages, was filed in the office of the auditor of said county contrary to law, that is within more than five days after having been made out; to wit, on May 26, 1909; that the plaintiff, since the action of said

commissioners in said proceedings was at all times irregular and insufficient, did not appeal therein; that plaintiff has received no damage for any are attempted to be provided for road purposes across plaintiff's aforesaid land; that said action of said county commissioners, if effective, would deprive plaintiff of his property contrary to law, etc.

W. F. Blume, for appellant.

In establishing highways the provisions as to time and notice must be strictly observed. 37 Cyc. 66 and cases cited.

The record of the proceedings must show that a proper notice of the meeting of the commissioners was duly served, published, or posted; otherwise the proceedings will be void.

The fact of service, and not the proof of it, gives jurisdiction. *Krenik v. Cordova*, 95 Minn. 372, 104 N. W. 130; *Thompson v. Berlin*, 87 Minn. 7, 91 N. W. 25.

Notices shall be served in the manner designated by law, and proof of service shall be made in the prescribed way. *State, Clark, Prosecutor, v. Elizabeth*, 32 N. J. L. 357; *Babb v. Carver*, 7 Wis. 124; *Adams v. Clarksburg*, 23 W. Va. 203; *Hemingway v. Chicago*, 60 Ill. 324; *Coquard v. Boehmer*, 81 Mich. 445, 45 N. W. 996; *Anderson v. San Francisco*, 92 Minn. 57, 99 N. W. 420.

In a proceeding to establish a highway the owner or occupant of land affected must be made a party respondent. *Ft. Wayne v. Ft. Wayne & J. R. Co.* 149 Ind. 25, 48 N. E. 342; *Sherman v. Peterson*, 91 Mich. 480, 51 N. W. 1122; *Lyle v. Chicago, M. & St. P. R. Co.* 55 Minn. 223, 56 N. W. 820.

To justify the establishment of a highway by local officers, there must be statutory authority therefor, and such statutes, in so far as they authorize the taking of private property for public use, will be strictly construed. 37 Cyc. 53; *Curran v. Shattuck*, 24 Cal. 427; *Funderburk v. Spencler*, 234 Ill. 574, 85 N. E. 193; *Hyslop v. Finch*, 99 Ill. 171.

Failure to give notice will invalidate the proceedings. Notice, as required, is jurisdictional. *Audubon v. Hand*, 231 Ill. 334, 83 N. E. 196; *Highway Comrs. v. Smith*, 217 Ill. 250, 75 N. E. 396; *People ex rel. Willis v. Smith*, 7 Hun, 17; *Re Greenwood Twp. Road*, 23 Pa. Co. Ct. 85; *McIntire v. Lucker*, 77 Tex. 259, 13 S. W. 1027; *La Farrier v. Hardy*, 66 Vt. 200, 28 Atl. 1030; *Austin v. Allen*, 6 Wis. 134.

It is essential to the validity of these proceedings that the tribunal before which they are prosecuted should have jurisdiction both of the subject-matter and of the persons of those whose land is sought to be appropriated. *People ex rel. Atty. Gen. v. Brown*, 23 Colo. 425, 48 Pac. 661; *State, Loucheim, Prosecutor, v. Hemsley*, 59 N. J. L. 149, 35 Atl. 795; *Thatcher v. Powell*, 6 Wheat. 119, 5 L. ed. 221; *Dyckman v. New York*, 5 N. Y. 434; *Smith v. Rice*, 11 Mass. 507; *Schell v. Leland*, 45 Mo. 289.

Jurisdiction of the subject-matter and of the parties is required and must affirmatively appear on the face of the record of the proceedings. *Commissioners Court v. Thompson*, 18 Ala. 694; *Highway Comrs. v. People*, 2 Ill. App. 24; *Crossley v. O'Brien*, 24 Ind. 325, 87 Am. Dec. 329; *Wabaunsee County v. Muhlenbacker*, 18 Kan. 129; *People ex rel. Mead v. Highway Comrs.* 16 Mich. 63; *Whitely v. Platte County*, 73 Mo. 30; *Miller v. Brown*, 56 N. Y. 386.

The description must be sufficiently plain, clear, and accurate that it will be understood by persons of ordinary intelligence, and such as to enable a surveyor to locate it. *Elliott, Roads & Streets*, 350.

The character of the place of beginning and ending of the proposed highway has a bearing on the question of the public necessity, utility, and convenience of the highway. The notice must point out these things. 37 Cyc. 46; *Behrens v. Highway Comrs.* 169 Ill. 558, 48 N. E. 578.

The land ordered taken or affected must be described with certainty, and the survey must be made a part of the order. *Dunstan v. Jamestown*, 7 N. D. 1, 72 N. W. 899; *State ex rel. Milwaukee, L. S. & W. R. Co. v. O'Connor*, 78 Wis. 282, 47 N. W. 433; *Beck v. Biggers*, 66 Ark. 292, 50 S. W. 514; *Phillips v. Tucker*, 3 Met. (Ky.) 69; *State, Taylor, Prosecutor, v. Hulick*, 37 N. J. L. 70; *Re O'Hara Twp. Road*, 152 Pa. 319, 25 Atl. 602; *Re Road*, 17 Pa. Co. Ct. 39; *Rose v. Garrett*, 91 Mo. 65, 3 S. W. 828.

In condemnation proceedings there should be such a description that the property to be taken may be ascertained from the record. *McDonald v. Payne*, 114 Ind. 359, 16 N. E. 795; *Rud v. Pope County*, 66 Minn. 358, 68 N. W. 1062, 69 N. W. 886.

The burden of proving the legal establishment and existence of a public highway is on the public authorities or other parties who allege

its existence. 37 Cyc. 154 and cases cited; *Dingwall v. Weld County*, 19 Colo. 415, 36 Pac. 148; *Van Wanning v. Deeter*, 78 Neb. 284, 110 N. W. 703, 112 N. W. 902; *Bare v. Williams*, 101 Va. 800, 45 S. E. 331.

The survey must not vary from the location ordered. *Phipps v. State*, 7 Blackf. 513; *Butler v. Barr*, 18 Mo. 357; *Dunstan v. Jamestown*, 7 N. D. 1, 72 N. W. 899.

The statutes must be strictly complied with as to filing the order. Comp. Laws 1913, § 1927; *Elliott, Roads & Streets*, 402; *Prescott v. Beyer*, 34 Minn. 493, 26 N. W. 732; *Highway Comrs. v. Barry*, 66 Ill. 496; *Dolphin v. Pedley*, 27 Wis. 469; *Cole v. Van Keuren*, 6 Thomp. & C. 480; *Burns v. Multnomah R. Co.* 8 Sawy. 543, 15 Fed. 177; 15 Am. & Eng. Enc. Law, 2d ed. 385; *Poole v. Breese*, 114 Ill. 594, 3 N. E. 714; *Wright v. Highway Comrs.* 145 Ill. 48, 33 N. E. 876.

The Constitution requires that the question of compensation shall be determined by an impartial tribunal. Nor is it competent for the legislature to provide that the compensation may be fixed by the corporation asking to condemn the land, nor that it be fixed by an agent or officer of such corporation. *Elliott, Roads & Streets*, 301, and cases cited; *Chase v. Evanston*, 172 Ill. 403, 50 N. E. 241; *Cunningham v. Campbell*, 33 Ga. 625; *Kramer v. Cleveland & P. R. Co.* 5 Ohio St. 140; *Powers v. Bears*, 12 Wis. 214, 78 Am. Dec. 733.

Thos. G. Johnson, for respondents.

Where there is an award of damages for taking property for public highway purposes, and where by error of the county auditor or clerk the description is erroneous as to the quarter section, this fact would not invalidate the proceedings. 23 Cyc. 854.

Where a tribunal is invested by law with the original jurisdiction of a subject, like the laying out of a public highway, its decisions are not necessarily void, although the decision on the question of the right to proceed may be erroneous. *Elliott, Roads & Streets*, § 300.

If not void, but merely voidable, they cannot be attacked in a collateral proceeding. *Elliott, Roads & Streets*, § 378.

A party interested and who should have received notice of the meeting, if personally present, is estopped to question the validity of the

proceedings, because no notice was served upon him. 37 Cyc. 97, 130, and notes 15 and 17.

Such a party has had his day in court. Elliott, Roads & Streets, 2d ed. § 379.

Where jurisdiction has once been acquired, a collateral attack cannot succeed. Davenport Mut. Sav. Fund & L. Asso. v. Schmidt, 15 Iowa, 213; 37 Cyc. 136.

The time of making the survey is not material. Ekwortzell v. Blue Grass Twp. 28 N. D. 20, 147 N. W. 726; Dunstan v. Jamestown, 7 N. D. 1, 72 N. W. 899; 37 Cyc. 75.

The statute requiring the order to be filed within five days is merely directory. The order does not become void until after twenty days. Wayne v. Caldwell, 1 S. D. 483, 36 Am. St. Rep. 750, 47 N. W. 547.

Appellant's failure to attack the order in reasonable time after it was made and filed constitutes such laches as to bar him from contesting or disputing same at this late date. 37 Cyc. 130.

BRUCE, J. (after stating the facts as above). Counsel for respondent first urges that the attack is a collateral one and upon proceedings which are quasi judicial in their character. He therefore asserts that the remedy of the plaintiff and appellant, if any, was by appeal, and not by injunctive proceedings.

In this contention we believe he would be correct, provided that the record showed that the proceedings mentioned covered the property now in controversy, and that a definite route was prescribed which should pass thereover.

The portions of the statute which need to be considered here are as follows:

Section 1923, Compiled Laws of 1913: "The board having jurisdiction . . . may alter or discontinue any road or lay out any new road upon the petition of not less than six legal voters, who own real estate, or who occupy real estate under the homestead laws of the United States, or under contract from the state of North Dakota, in the vicinity of the road to be altered, discontinued or laid out; said petition shall set forth in writing a description of the road and what part thereof is to be altered or discontinued; and if for a new road, the names of the owners of the land, if known, over which the road is to pass, the point

at which it is to commence, its general course, and the point where it is to terminate; etc."

Section 1924: "Whenever such number of legal voters determine to petition, as aforesaid, for the alteration or discontinuance of any road, or for the laying out of any new road, they shall cause a copy of their petition to be posted up in three of the most public places in the county or township having jurisdiction thereof twenty days before any action is had in relation thereto."

Section 1925: "When the board having jurisdiction receives a petition in compliance with preceding sections, . . . they shall, within thirty days make out a notice and fix therein a time and place at which they will meet and decide upon such application, and the applicant shall, ten days previous to such time as so fixed, cause such notice to be given to all occupants of the land through which such highway may pass, which notice shall be served personally or by copy left at the abode of such occupant. The said board shall also cause copies of such notice to be posted in the three public places in said county or township, at least ten days previous to such meeting; every such notice shall specify, as near as practicable, the highway proposed to be laid out, altered or discontinued, and the tract of land through which the same may pass, etc."

Section 1926: "The board upon being satisfied that the notices required in the preceding sections have been duly served . . . shall proceed to examine such proposed highway and shall hear any reasons for or against the laying out, altering or discontinuing the same, and decide upon the application as they deem proper."

Section 1929: " . . . In case the board and the owners of land claiming damages cannot agree, . . . the board shall in their award of damages specify the amount of damages awarded to all such owners, giving a brief description of such parcel of land in their award; the board having jurisdiction shall assess the damages at what they deem just and right to each individual claimant with whom they cannot agree, etc."

As far as the preliminary proceedings which are required by the statute are concerned, the necessary steps seem to have been taken with the exception that the petitions were not posted until March 15, 1909, and that the land of the plaintiff through which the road was supposed

to run and which is here involved was not mentioned or described; the petitioner was made a party defendant in the preliminary proceedings and was personally served.

We do not believe that the failure to post the petitions until March 15, 1909, in itself deprived the commissioners of jurisdiction in the matter. Even though the petitions were not posted more than twenty days before the posting and service of the notices of the meeting, they were posted more than twenty days before the meeting and the hearing on the petition, which was on May 18, 1909.

Section 1925 provides that after receiving the petition the board shall have thirty days in which to make out a notice of the date and place of meeting to pass upon the same, and that that notice shall be served and posted ten days before such hearing. Section 1926 specifies, as the only prerequisite to the right of the board to proceed to a hearing in the matter, the satisfaction on their part "that the notices required in the preceding sections have been duly *served*."

It is true that § 1924 prescribes that "whenever such number of legal voters determine to petition, as aforesaid, for the alteration or discontinuance of any road, or for the laying out of any new road, they shall cause a copy of their petition to be posted up in three of the most public places in the county or township having jurisdiction thereof twenty days before any action is had in relation thereto."

This provision, however, we must construe in the light of the other sections mentioned and as a direction to the petitioners rather than to the board, and we must construe the word "action" which is therein contained to relate merely to the hearing and determination of the petition.

The complaint admits that the notices required to be given by the commissioners were served. This service is elsewhere shown in the exhibits. The plaintiff, therefore, had the opportunity for his day in court and an opportunity after the petitions had been posted for more than twenty days.

It is clear that although the property involved in this suit was not specifically described either in the petition or in the order or even in the survey, yet, if it was so described as to make the route clear to any reasonably intelligent man, and since the petitioner was made a party defendant and served, a technical description was not necessary.

Dunstan v. Jamestown, 7 N. D. 1, 72 N. W. 899; Ekwortzell v. Blue Grass Twp. 28 N. D. 20, 147 N. W. 726; 37 Cyc. 75.

It is also clear that no matter what may be the rule in other jurisdictions, in North Dakota an appeal lies from the determination of the commissioners, both as to the route to be taken and the damages to be awarded. See Comp. Laws 1913, §§ 1928, 1931, 1935-1939.

If, therefore, the land of the petitioner was sufficiently described, and the order of the commissioners covered this land, and the survey was in conformity with that order, it is clear that plaintiff cannot in this collateral attack question the regularity of the proceedings or the final determination of the said board. Ekwortzell v. Blue Grass Twp. *supra*.

We are satisfied, however, that the land involved was not sufficiently described, and that, as far as this land is concerned at any rate, both the order of the commissioners and the subsequent survey were nullities. They were nullities because they are absolutely unintelligible. 37 Cyc. 103; Beck v. Biggers, 66 Ark. 292, 50 S. W. 514; Re O'Hara Twp Road, 152 Pa. 319, 25 Atl. 602; Rud v. Pope County, 66 Minn. 358, 68 N. W. 1062, 69 N. W. 886; Dunstan v. Jamestown, 7 N. D. 1, 72 N. W. 899.

If the highway is being attempted to be opened along the line of the survey which was made two years after the filing of the order of the commissioners, the proceeding is entirely void. In any view of the record, that line does not start at the point contemplated by the order, that is to say at the southeast corner of sec. 23, or the northeast corner of sec. 26, but 92 feet west thereof. There is in the record no subsequent order approving this survey, and the survey, therefore, and the route therein prescribed, are absolute nullities. Dunstan v. Jamestown, *supra*; Butler v. Barr, 18 Mo. 357; Phipps v. State, 7 Blackf. 513.

But even the order itself is unintelligible. After tracing the highway for a certain distance, it provides that it shall run "then east between sections 23 and 26, then diagonally across the east half of the north-west quarter, and then straight east between sections 25 and 30."

It will be noticed that nothing is said of the west half of the north-east quarter, and it is absolutely necessary that the highway should run through this half in order to reach the east half. But even if we assume that the road was to run through this half, where was it to begin and

where was it to end? We may assume that it was to begin at the northeast corner of section 26, or the southeast corner of section 23,—in fact if it does not begin there no other definite location is given and it begins nowhere, but where is it to end? All that the order prescribes is that it shall run diagonally across the east half of the northwest quarter, and then straight east between sections 25 and 30. We are even compelled to interpolate the words “of section 25” after the northwest quarter, for the section is not given. Even if it is a northwest quarter of section 25 and the road is then to run straight east between sections 25 and 30, at what point on the line between sections 25 and 30 is the line to connect?

The fact that the commissioners themselves were in doubt is evidenced by the fact that the survey and the order are inconsistent with one another. The word diagonal as a noun is defined by Webster as, “A right line drawn from one angle to another not adjacent of a figure of four or more sides and dividing it into two parts.” As an adjective it is defined “as joining two not adjacent angles of a quadrilateral or multilateral figure; running across from corner to corner; crossing at an angle with one of the sides.” If the angle formed by a diagonal line was required to be an angle of 45 degrees from the line which is at right angles with the point at beginning, the problem would be simple, but such is not the meaning of the word. It may be at any angle with such a line and that angle is determined, not by the point of beginning, but by the point of ending.

No man, however intelligent, can do any more than to guess at the intention of the commissioners, and such a description is not binding upon anyone.

The judgment of the District Court is reversed and the cause is remanded for further proceedings according to law.

CARL A. SHELLBERG v. J. P. KUHN.

(160 N. W. 504.)

Evidence — trial court — rulings — instructions — admission of evidence.

For the reasons stated in the opinion, certain rulings on the admission of evidence are sustained, and certain instructions are held proper or nonprejudicial.

Opinion filed November 14, 1916. Rehearing denied December 21, 1916.

From a judgment of the District Court of Traill County, *Pollock, J.*, plaintiff appeals.

Affirmed.

Pfeffer & Pfeffer, for appellant.

Declarations, incompetent as hearsay, are not rendered admissible because they may tend to corroborate other testimony. *Holt v. Johnson*, 129 N. C. 138, 39 S. E. 796; *First Nat. Bank v. Holland*, 99 Va. 495, 55 L.R.A. 155, 86 Am. St. Rep. 898, 39 S. E. 129.

Neither is competent the declaration of a stranger to the effect that a statement shown to have been made by a witness in his presence, to corroborate the witness. *Pegram v. Seaboard Air Line R. Co.* 139 N. C. 303, 51 S. E. 975, 4 Ann. Cas. 214; *Vermillion v. LeClare*, 89 Mo. App. 55.

The rigor with which the rule excluding hearsay has been adhered to under the common-law system is no doubt due in part to the jealous preservation of the right of trial by jury. *Jones*, Ev. 2d ed. p. 374; *Reagan v. McKibben*, 11 S. D. 270, 76 N. W. 943, 19 Mor. Min. Rep. 556.

"Witnesses should be permitted to testify to facts only, and not to any conclusions they may deduce from the facts, except in the case of experts." *Illinois Steel Co. v. McNulty*, 105 Ill. App. 594.

Neither is the opinion of the witness admissible when all the facts are capable of being clearly established, so that the jury can draw their own conclusions. *Sumner v. Sumner*, 118 Ga. 590, 45 S. E. 509; *Munson v. Farwell*, 16 Ill. App. 365; *Hicks v. Williams*, 112 Iowa, 691, 84 N. W. 935; *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813; *Smith v. Castle*, 81 App. Div. 638, 81 N. Y. Supp. 18; *Veum v.*

Sheeran, 88 Minn. 257, 92 N. W. 965; Zube v. Weber, 67 Mich. 52, 34 N. W. 264; Eagle Mfg. Co. v. Jennings, 29 Kan. 657, 44 Am. Rep. 668.

In an action for commissions for selling lands, the purchaser cannot testify who induced him to make the purchase. The question calls for a conclusion. Jenkins v. Beachy, 71 Kan. 857, 80 Pac. 947; Robins v. Legg, 80 Minn. 419, 83 N. W. 379; University of Chicago v. Emmert, 108 Iowa, 500, 79 N. W. 285.

The evidence should be strictly confined to the matters in issue. Jones, Ev. 2d ed. pp. 151, 157; Best, Ev. 10th ed. § 251; 1 Taylor, Ev. 10th ed. § 317.

The preponderance of the evidence means that the testimony which points to a certain conclusion appears to the trier of facts to be more credible than testimony to the contrary. Short v. Bohle, 64 Mo. App. 242; McKee v. Verdin, 96 Mo. App. 208, 70 S. W. 154; Union P. R. Co. v. Estes, 37 Kan. 715, 16 Pac. 131; San Antonio & A. P. R. Co. v. Manning, 20 Tex. Civ. App. 504, 50 S. W. 177; Atchison, T. & S. F. R. Co. v. Retford, 18 Kan. 245; Pelitier v. Chicago, St. P. M. & O. R. Co. 88 Wis. 521, 60 N. W. 250; McCarthy v. Birmingham, 2 Neb. (Unof.) 724, 89 N. W. 1003; North Chicago Street R. Co. v. Fitzgibbons, 180 Ill. 466, 54 N. E. 483; Clayton v. Keeler, 18 Misc. 488, 42 N. Y. Supp. 1051; Northern P. R. Co. v. Holmes, 3 Wash. Terr. 543, 18 Pac. 76; West Chicago Street R. Co. v. Lieserowitz, 197 Ill. 607, 64 N. E. 718; Harris v. Perkins, — Miss. —, 25 So. 154; Story v. Maclay, 6 Mont. 492, 13 Pac. 198; Pelitier v. Chicago, St. P. M. & O. R. Co. 88 Wis. 521, 60 N. W. 250; Strand v. Chicago & W. M. R. Co. 67 Mich. 380, 34 N. W. 712, 4 Am. Neg. Cas. 70; Holmes v. Horn, 120 Ill. App. 362.

To authorize a jury to accept or reject any part of the evidence depends upon whether they believe it to be true or untrue, and not whether they believe the same to be just and right. Hall v. State, 134 Ala. 90, 32 So. 750; Hyde v. Shank, 77 Mich. 517, 43 N. W. 890; Lancashire Ins. Co. v. Stanley, 70 Ark. 1, 62 S. W. 66.

An instruction which gives the jury an intangible and unwarranted license is misleading. Sherman v. Menominee River Lumber Co. 77 Wis. 14, 45 N. W. 1079.

In case of an open, mutual, and current account, the cause of action
35 N. D.—29.

to recover the balance is deemed to accrue at the date of the lost item proved. The limitation statute begins to run from such date. 25 Cyc. 1064; *Washington v. Timberlake*, 74 Ala. 259; *Harwell v. Steele*, 17 Ala. 372; *Saulsbury v. Iverson*, 73 Ga. 733; *Finney v. Brumby*, 64 Ga. 510; *Lee v. Lee*, 31 Ga. 26, 76 Am. Dec. 681; *Gilchrist v. Williams*, 3 A. K. Marsh. 235, 3 Bibb, 49; *Nason v. McCulloch*, 31 Me. 158; *Tyler v. Boyce*, 135 Mass. 558; *Nolin v. Blackwell*, 31 N. J. L. 170, 86 Am. Dec. 206; *Dieffenbach v. Roch*, 112 N. Y. 621, 2 L.R.A. 829, 20 N. E. 560; *Ruggles v. Keeler*, 3 Johns. 263, 3 Am. Dec. 482; *McClure v. Johnson*, 10 Okla. 663, 65 Pac. 103; *Taylor v. Gould*, 57 Pa. 152.

Jurors generally understand that the burden of proof is on the plaintiff in all cases, and it is reversible error to refuse to instruct them in a case involving that question, when, and under what conditions, the burden shifts to defendant. *Stevens v. Pendleton*, 94 Mich. 405, 53 N. W. 1108; 16 Cyc. 931; *O'Neal v. Curry*, 134 Ala. 216, 32 So. 697; *Brigham v. Carlisle*, 78 Ala. 243, 56 Am. Rep. 28; *Wetherell v. Holister*, 73 Conn. 622, 48 Atl. 826; *East v. Crow*, 70 Ill. 91; *Gile v. Sawtelle*, 94 Me. 46, 46 Atl. 786; *Broaders v. Toomey*, 9 Allen, 65; *Blum v. Versteeh Grant Shoe Co.* 77 Mo. App. 567; *Belshaw v. Colie*, 1 E. D. Smith, 213; *Plattner v. Weiler*, 26 Misc. 813, 57 N. Y. Supp. 98; *Davis-Colby Ore Roaster Co. v. Rogers*, 191 Pa. 229, 43 Atl. 567.

"Where a trial judge by his remarks minimizes the evidence of a witness, and states as a fact a matter which is in dispute, he commits error." *Belt R. Co. v. Confrey*, 111 Ill. App. 473; *Whitelaw v. Whitelaw*, 83 Va. 40, 1 S. E. 407.

"An instruction which assumes facts to have been proved, when there is conflicting evidence in relation thereto, is properly refused." *Parliaman v. Young*, 2 Dak. 175, 4 N. W. 139, 711; *Young v. Harris*, 4 Dak. 367, 32 N. W. 97.

F. W. Ames, for respondent.

"It seems to be generally held that where there are distinct counts or causes of action, and cross-complaints and counterclaims, all tried in the same case, a new trial may be granted as to a part only and denied as to the others. Such causes of action and counterclaims must be distinct and independent of each other, otherwise a new trial will not be

granted as to part only." *Spawn v. South Dakota C. R. Co.* 26 S. D. 1, 127 N. W. 648, Ann. Cas. 1912D, 979; 29 Cyc. 734, and cases cited; 4 C. J. 1180, §§ 3214-3215.

The verdict has ample support in the evidence, and is binding upon the appellate court. *Montana Eastern R. Co. v. Lebeck*, 32 N. D. 162, 155 N. W. 648; *Bergh v. John Wyman Farm Land & Loan Co.* 30 N. D. 158, 152 N. W. 281; *Akin v. Johnson*, 28 N. D. 205, 148 N. W. 535; *Taute v. J. I. Case Threshing Mach. Co.* 25 N. D. 102, 141 N. W. 134, 4 N. C. C. A. 365; *Casey v. First Bank*, 20 N. D. 211, 126 N. W. 1011 and cases cited; *Nilson v. Horton*, 19 N. D. 187, 123 N. W. 397; *Rickell v. Sherman*, 34 N. D. 298, 158 N. W. 266.

The rule is that the plaintiff must present the greater weight of evidence, which is called a preponderance. *Buchanan v. Occident Elevator Co.* 33 N. D. 346, 157 N. W. 122; *McGregor v. Great Northern R. Co.* 31 N. D. 471, 154 N. W. 266.

The very theory upon which the statute on mutual accounts is based is that the credits are mutual; that the account is permitted to run with the view of ultimate adjustment by settlement and payment of the balance. *Millett v. Bradbury*, 109 Cal. 170, 41 Pac. 865.

In the case here, some of the items are matters of tort. Some are contractual,—all disconnected. *Ibid.*; *Norton v. Larco*, 30 Cal. 127, 89 Am. Dec. 70; *Adams v. Patterson*, 35 Cal. 122.

The rule of damages where personal property has no market value, such as second-hand goods, wagons, etc., is generally that its value is to be ascertained from such elements as are ascertainable. *McMahon v. Dubuque*, 107 Iowa, 62, 70 Am. St. Rep. 143, 77 N. W. 517, 5 Am. Neg. Rep. 147 and cases cited; 13 Cyc. 148.

While it is incumbent on the plaintiff to show that money is paid at the request of defendant, it is not necessary to show an express request. *Holbrook v. Clapp*, 165 Mass. 563, 43 N. E. 508.

Where an instruction is correct as far as it goes, error cannot be assigned on the ground that it was not sufficiently full and explicit, in the absence of a request for more specific instructions. *Zilke v. Johnson*, 22 N. D. 75, 132 N. W. 640, Ann. Cas. 1913E, 1005; 4 C. J. 918, § 2890; *Seckerson v. Sinclair*, 24 N. D. 625, 140 N. W. 239; *Huffman v. Bosworth*, 25 N. D. 22, 140 N. W. 672.

CHRISTIANSON, J. This action was tried to a jury in the district court of Traill county, and resulted in a verdict for the defendant. Judgment was entered pursuant to the verdict, and plaintiff appeals from the judgment.

In his complaint, plaintiff sets forth ten causes of action against the defendant. The first cause of action is for the value of 226 bushels of barley at 65 cents per bushel, alleged to have been sold on or about November 26, 1906; the second cause of action for 8 bushels of barley alleged to have been sold and delivered to defendant by the plaintiff on or about July 10, 1907; the third cause of action for the cost of repairing a certain wagon wheel upon a wagon loaned to the defendant by the plaintiff during October, 1906, of the value of \$4.50; the fourth cause of action for certain repairs for a cream separator and drill of the value of \$2.35, bought by the plaintiff for the defendant in April, 1907; the fifth cause of action for the injury to a certain wagon pole and double-tree on a wagon belonging to the plaintiff in the fall of 1907, of the value of \$7.75; the sixth cause of action for 2½ tons of hay sold by the plaintiff to the defendant in June, 1906, of the value of \$16.25; the seventh cause of action for the value of a certain cook car of the value of \$20, alleged to have been converted by the defendant during July, 1906; the eighth cause of action for certain labor performed by the plaintiff for the defendant during the years 1906 and 1907, amounting to \$89; the ninth cause of action for the use of a certain bundle wagon furnished by the plaintiff to the defendant during 1907, amounting to \$15; the tenth cause of action for \$4.50 for injury to the reach and side boards of a certain wagon loaned by the plaintiff to the defendant in October, 1907.

Defendant's answer alleges that the first cause of action is barred by the Statute of Limitations, denies all the allegations of plaintiff's second cause of action, and denies the allegations of plaintiff's third, fifth, and ninth causes of action, except that defendant alleges that all of said causes of action relate to the same wagon, and that said wagon was worth not to exceed \$10, in the fall of 1906; that defendant used said wagon with the consent of the plaintiff during the falls of 1906 and 1907; that the wagon was worn and old and did break down, and that the defendant paid to one Clefstad, a blacksmith in Hillsboro, \$12 for repairing the same and cutting down the wheels to make said wagon into

a truck wagon. : In answer to the fourth cause of action, the defendant denies that plaintiff furnished any repairs for the drill, and alleges that the plaintiff presented to him the repairs for the cream separator of the value of 25 cents. In answer to the sixth cause of action, plaintiff denies that he purchased 2 tons of hay, and alleges that he bought 1 ton of hay from the defendant of the value of \$5; and a further defense alleges payment and the bar of the Statute of Limitations. In answer to the seventh cause of action, defendant denies that plaintiff was the owner of the cook car. In answer to the eighth cause of action, plaintiff interposes a general denial and the plea of the Statute of Limitations. Defendant also alleges as a counterclaim that in 1907 he threshed for the plaintiff for two days for which plaintiff agreed to pay \$25 per day, or \$50 in all, and that plaintiff thereafter delivered to defendant 142½ bushels of barley at the agreed price of 35 cents per bushel. For a second counterclaim defendant alleges that in October, 1906, he furnished plaintiff labor at the agreed price of \$15, which has not been paid. For a third defense and counterclaim, defendant alleges that in April, 1907, he sold and delivered to the plaintiff, at his request, one drill at the agreed price of \$10. For a fourth counterclaim, defendant alleges that he was the owner of the cook car referred to in plaintiff's complaint, and that he loaned the same to the plaintiff, who used it for a period of two years, and that the value of such use was \$10. Defendant further alleges that in October, 1906, one Richard Manger, who was then indebted to plaintiff in the sum of \$30.68, paid this amount to defendant, and that defendant gave plaintiff credit for that amount upon the indebtedness owing by the defendant to the plaintiff: that defendant subsequently presented an account (which account contained no charge for the use of the cook car) to the plaintiff, showing that defendant was indebted to plaintiff in the sum of \$6.32, to which account defendant made no objection. In his reply plaintiff admits that plaintiff's sixth cause of action is barred by the Statute of Limitations, and admits the allegations contained in defendant's third counterclaim, interposes the plea of the Statute of Limitations to the defendant's second counterclaim, and denies the other allegations of new matter contained in the answer.

The evidence shows that the defendant owned and operated a threshing machine; that during the falls of 1906 and 1907 he threshed for the

plaintiff; and that plaintiff furnished some labor and teams for the operation of said threshing machine during both falls. The evidence also shows that during both falls the defendant threshed for other neighbors, among others, one Richard Manger, and that the plaintiff furnished teams and performed labor in the threshing of Manger's crop during both falls. The plaintiff testified that he sold and delivered to the defendant the barley mentioned in the first and second causes of action; that no price was fixed therefor, but that the defendant agreed to pay for the same whatever price plaintiff should receive for the remainder of his barley when he sold the same in the spring of 1907. The plaintiff also testified that he paid the defendant in full for threshing his grain during both 1906 and 1907, and that in such settlement the labor performed by the plaintiff and the teams furnished by him in threshing grain upon defendant's farm was adjusted. Plaintiff further testified that the defendant was indebted to him in the sum of \$89, as alleged in the eighth cause of action, but that this amount was due for teams and labor furnished in threshing the grain upon Richard Manger's place; that plaintiff furnished such teams at defendant's request, and that defendant agreed to pay therefor. The defendant, on the other hand, testified positively that the barley which he received from the plaintiff in the fall of 1906 was received in part payment of the threshing bill which plaintiff owed him at that time. Defendant denied that he received any barley in the summer of 1907. Defendant admitted that the plaintiff furnished teams and performed labor in threshing Manger's grain, but denied positively that he either engaged plaintiff to do so or agreed to pay therefor. Defendant claimed that this was a matter between the plaintiff and Manger alone; that defendant merely furnished the threshing rig, and the man operating the rig itself (such as engineer, separator-man, etc.), and that the farmers for whom he threshed furnished their own teams and crews. The defendant further testified that Richard Manger had paid him \$30.68 (which Manger owed to Shellberg), and that defendant had given plaintiff credit for this amount upon the threshing bill which plaintiff owed to defendant.

Plaintiff testified fully with respect to the labor performed and teams furnished in the threshing of Richard Manger's grain, giving the various days when this threshing was done. In testifying, plaintiff re-

ferred to certain memoranda. The defendant, when testifying with reference to this threshing, also referred to certain memoranda from which he stated the amount of time consumed in threshing Manger's grain in the falls of 1906 and 1907. They differed as to the length of such time.

Plaintiff assigns error upon the admission of the defendant's testimony relative to the credit given to the plaintiff for the \$30.68 received by him from Richard Manger. It is contended that this was a statement made by one not a party to the suit, and therefore hearsay and inadmissible; and also that it constituted a conclusion on the part of the defendant as to the amount due to the plaintiff for the work performed for Manger. We are wholly unable to see any merit in appellant's contention. The plaintiff was permitted to testify fully with respect to the length of time consumed in threshing Manger's grain. He produced memoranda upon which he based his testimony. The defendant did exactly what plaintiff had already been permitted to do. The principal question at issue was whether defendant had engaged plaintiff to perform this work. On this there was a square conflict between the parties. The court in instructing the jury on this phase of the case said: "The theory of the plaintiff, Shellberg, is that he was performing service and furnishing his teams to Kuhn while this work, it is true, was done on the Manger farm and possibly for Manger ultimately, yet Shellberg claims that he performed those services at the instance and request of Kuhn, and therefore Kuhn is liable as an original payor; while upon the other hand Kuhn insists that if Shellberg did that work for Manger he was working for Manger, either by exchanging works or some other method for which Kuhn was not responsible at all. Now, I charge you, gentlemen of the jury, that as a matter of law if Kuhn became an original promisor to secure Shellberg to do the work for Manger, and that before the work was done promised to pay for it and thus put himself in the attitude of securing Shellberg to do the work for him Kuhn, then Kuhn would be responsible for the full amount of the value of such services as shown by the evidence. Whereas, upon the other hand, if you find that Shellberg was working for Manger and exchanging works with Manger, or had his deal with Manger, then Kuhn would not be liable under the evidence in this case, because there

is no evidence here which shows that he has by any written obligation agreed to become responsible for Manger's debt."

On this issue the jury found for the defendant. This being so, it was immaterial whether Richard Manger had paid over to defendant all the moneys which he actually owed to the plaintiff, or not, and it seems self-evident that the plaintiff can have no valid reason to complain because defendant gave him credit for the \$30.68 which he (defendant) received from Manger.

Plaintiff also contended that the instruction above quoted is erroneous. In plaintiff's brief, it is said: "The only construction which the jury could have placed upon this instruction was that before defendant could be held liable he must have expressly promised to make payment. The trial court evidently disregarded the fact that in cases of this kind the law would imply a promise to pay."

Plaintiff's contention is utterly untenable. The question of an implied contract or obligation was not even suggested in this case. The plaintiff testified positively that the services for which he sought to recover had been performed,—not for the benefit of the defendant, but for the benefit of one Richard Manger. Plaintiff based his right to recover upon an express, and not upon an implied, contract. He said in effect: I performed these services for Richard Manger at the express request of the defendant, and he agreed to pay me therefor. How could the instructions regarding an implied obligation to pay for services be necessary or appropriate under these circumstances? A mere statement of the proposition demonstrates the unsoundness of plaintiff's contention. See *Comptograph Co. v. Citizens Bank*, 32 N. D. 59, 155 N. W. 680.

Plaintiff also contends that the court erred in instructing the jury as follows: "Now, generally speaking, may I tell you that the burden of proof falls upon the plaintiff in this case to show by a fair preponderance of the evidence the facts alleged by him. That is, he must produce the more evidence." Plaintiff asserts that this instruction led the jury to believe that preponderance of evidence meant the greater number of witnesses.

The instruction quoted, however, is not a complete instruction. The complete instruction was as follows: "Now, generally speaking, may I tell you that the burden of proof falls upon the plaintiff in this case

to show by a fair preponderance of the evidence the facts alleged by him. That is, he must produce the more evidence. The rule of law which applies in criminal cases, that the evidence must be so strong that it convinces you beyond a reasonable doubt, does not apply in a civil action. *The rule here is that the plaintiff must present the greater weight of evidence, which we call preponderance.*" We have repeatedly held that the instructions must be considered as a whole. *McGregor v. Great Northern R. Co.* 31 N. D. 471, 154 N. W. 261. When the instruction criticized is so considered, all foundation for appellant's argument disappears. It is inconceivable that reasonable, intelligent men could construe the same as plaintiff suggests.

In his instructions to the jury, the court withdrew from its consideration the plaintiff's claim for labor performed in 1906, on the ground that this was barred by the Statute of Limitations, which defense was properly pleaded in defendant's answer. Plaintiff's counsel assert this ruling as error. They say: "When there is a mutual, open, and current account consisting of reciprocal demands, the Statute of Limitations commences to run from the date of the last item proved by either party." There is no question about the correctness of plaintiff's statement of the rule of law applicable to actions brought upon accounts. This rule is announced by § 7379, Compiled Laws 1913, which reads as follows: "In an action brought to recover a balance due upon a mutual, open, and current account, when there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side."

The trouble, however, with plaintiff's contention is that the rule of law relied upon has no application to the facts in this case. In fact, plaintiff has not sought to recover upon account. He has seen fit to allege ten different causes of action arising out of different transactions. Some of the causes alleged sound in tort and some in contract. Plaintiff claims that in the fall of 1906 and in the fall of 1907, he made settlement with the defendant and paid him in full all claims which defendant had against the plaintiff. The indebtedness, according to plaintiff's contention, was all on one side of the ledger,—all owing from the defendant to the plaintiff. The very form of action which plaintiff has brought negatives any idea on his part "to recover a balance due upon a mutual, open, and current account." See 25 Cyc. 1118 et seq.

Certain errors are also assigned upon the court's failure to instruct. No request for instructions was submitted by the plaintiff, and the instructions given were not so incomplete as to mislead the jury. Consequently, plaintiff's assignment is without merit. If he desired more complete instructions he should have so requested. *McGregor v. Great Northern R. Co.* 31 N. D. 471, 154 N. W. 261.

Other assignments of error are predicated upon rulings in the admission of evidence and the instructions to the jury. Some of the errors so assigned are dependent upon those already discussed. Others have no real existence, and cannot be said to fairly arise upon the record in this case. All of the errors so assigned are obviously without merit. We find no error which would justify us in directing a reversal.

The judgment appealed from must therefore be affirmed. It is so ordered.

HERMAN E. SOX, Respondent, v. W. W. MIRACLE, M. W. Miracle, Maggie Miracle, Standard Oil Company, a Corporation, Dodson, Fisher, Brockman Company, a Corporation, North Star Lumber Company, a Corporation, Defendants, M. W. Miracle, Respondent, Dodson, Fisher, Brockman Company, Appellant.

(160 N. W. 716.)

Executory land contract — school lands — purchase of — from state — real property — statutes — levy upon — by creditor — sold as real estate.

An executory land contract for the purchase of school lands from the state of North Dakota, although technically speaking not real property, must, under the provisions of §§ 300 to 335, Compiled Laws 1913, be levied upon and sold by a creditor of the vendee as such.

Opinion filed December 2, 1916. Rehearing denied December 28, 1916.

Action to have an assignment of a school land contract declared a mortgage and for the foreclosure of the same. Claim of a prior attachment.

Appeal from the District Court of La Moure County, *J. A. Coffey, J.* Judgment for plaintiff. Defendant Dodson, Fisher, Brockman Company appeals.

Reversed.

Henry G. Middaugh and Rollo F. Hunt, for appellant.

Under an executory contract for the purchase and sale of state school lands, the holder of such contract may maintain an action for injuries done to the lands. Such holder has an interest in the lands. He is vested with an estate in the lands. Assignees of such holder, when the contract is properly assigned, delivered, and recorded, are invested with the same rights therein and thereunder as was the person who obtained the contract from the state. Comp. Laws, 1913, §§ 314, 315; Laws 1893, chap. 118, § 30; *Brooke v. Eastman*, 17 S. D. 339, 96 N. W. 699; 28 Am. & Eng. Enc. Law, 107; *Bissell v. Heyward*, 96 U. S. 580, 24 L. ed. 678; *Jennison v. Leonard*, 21 Wall. 302, 22 L. ed. 539; *Martin v. Bryson*, 31 Tex. Civ. App. 98, 71 S. W. 615; *Allen v. Cadwell*, 55 Mich. 8, 20 N. W. 692; *Kercheval v. Wood*, 3 Mich. 509; How. Anno. Stat. (Mich.) 5729, 7532; *Robertson v. Howard*, 82 Kan. 588, 109 Pac. 696; *Travis v. Topeka Supply Co.* 42 Kan. 625, 22 Pac. 991; *Poole v. French*, 71 Kan. 391, 80 Pac. 997.

Lands held by equitable title are subject to levy and sale as well as that held by legal title. *Aldrich v. Boice*, 56 Kan. 170, 42 Pac. 695.

Such title, under such a contract, is properly levied upon under execution or attachment, as real property. Rev. Codes 1905, §§ 7137, 9532, Comp. Laws 1913, §§ 7751, 10,368; *Nearing v. Coop*, 6 N. D. 345, 70 N. W. 1044; *Wadge v. Kittleson*, 12 N. D. 452, 97 N. W. 856; *Salzer Lumber Co. v. Claffin*, 16 N. D. 601, 113 N. W. 1036.

The interest of the vendee in such a contract is the money contracted to be paid by the purchaser, and he retains legal title only as security. The interest of vendee thereunder is the land contracted to be conveyed. *Clapp v. Tower*, 11 N. D. 556, 93 N. W. 862; *Williams v. Haddock*, 145 N. Y. 144, 39 N. E. 825; *Keep v. Miller*, 42 N. J. Eq. 100, 6 Atl. 495; 7 Am. & Eng. Enc. Law, 2d ed. 471, cases cited in note 1; *Woodward v. McCollum*, 16 N. D. 42, 111 N. W. 623; 29 Am. & Eng. Enc. Law, 2d ed. 703, and cases cited; *Nearing v. Coop*, 6 N. D. 349, 70 N. W. 1044; *Roby v. Bismarck Nat. Bank*, 4 N. D. 156, 50 Am. St. Rep. 633, 59 N. W. 719; *Moen v. Lillestal*, 5 N. D. 331, 65 N. W. 694; Pom. Eq. Jur. 368, and cases cited; *Warvelle, Vend. & P.* 2d ed. 842; *Lombard v. Chicago Sinai Congregation*, 64 Ill. 477; *Rand v. Garner*, 75 Iowa, 311, 39 N. W. 515; *Sheppard v. Messenger*, 107 Iowa, 717, 77 N. W. 515; *Hook v. Northwest Thresher Co.* 91 Minn. 482,

98 N. W. 463; *Wilder v. Haughey*, 21 Minn. 101; *Reynolds v. Fleming*, 43 Minn. 514, 45 N. W. 1099; *Atwater v. Manchester Sav. Bank*, 45 Minn. 341, 12 L.R.A. 741, 48 N. W. 187; *Marston v. Williams*, 45 Minn. 116, 22 Am. St. Rep. 719, 47 N. W. 644; *Van Camp v. Peerenboom*, 14 Wis. 66; *Lippencott v. Wilson*, 40 Iowa, 425; *Simonson v. Wenzel*, 27 N. D. 738, L.R.A. —, —, 147 N. W. 804.

The attachment creditor is protected against unrecorded conveyances. Rev. Codes 1905, § 5038, Comp. Laws 1913, § 5594; *Mott v. Holbrook*, 28 N. D. 251, 148 N. W. 1061; *Enderlin Invest. Co. v. Nordhagen*, 18 N. D. 523, 123 N. W. 390, 21 N. D. 25, 129 N. W. 1024; 2 R. C. L. 857; *National Bank v. Western P. R. Co.* 157 Cal. 573, 27 L.R.A.(N.S.) 987, 108 Pac. 676, 21 Ann. Cas. 1391; *Westervelt v. Hagge*, 61 Neb. 647, 54 L.R.A. 333, 85 N. W. 852.

A judgment obtained in a suit where an attachment has been levied relates back to the date of such levy. *Cummings v. Duncan*, 22 N. D. 534, 134 N. W. 712, Ann. Cas. 1914B, 976; *Brooke v. Eastman*, 17 S. D. 339, 96 N. W. 699; *Simonson v. Wenzel*, 27 N. D. 738, L.R.A. —, —, 147 N. W. 804; *Balen v. Mercier*, 75 Mich. 42, 42 N. W. 666; *Miller v. Shelburn*, 15 N. D. 182, 107 N. W. 51.

The purchaser under an executory contract for the sale of land or a bond for title, being in possession and having partly performed his part of the contract, although the legal title remains in the vendor, has an interest in the premises which he may mortgage to a third person. 27 Cyc. 1037, 1139, and cases cited; *Krause v. Krause*, 30 N. D. 54, 151 N. W. 991; *Cummings v. Duncan*, 22 N. D. 534, 134 N. W. 712, Ann. Cas. 1914B, 976.

Engerud, Holt, & Frame, for M. W. Miracle, respondent, and *Davis & Warren*, for plaintiff, respondent.

The method of levy under an execution or writ of attachment depends upon the character of the property to be proceeded against, and this distinction is especially marked as between real and personal property. Comp. Laws 1913, §§ 7547, 7720.

Such proceedings were not known to the common law, but are wholly statutory. *Birchall v. Griggs*, 4 N. D. 305, 50 Am. St. Rep. 654, 60 N. W. 842; *Latham v. Blake*, 77 Cal. 646, 20 Pac. 417, 18 Pac. 150.

The directions of the statute must be strictly followed. *Ireland v.*

Adair, 12 N. D. 29, 102 Am. St. Rep. 561, 94 N. W. 766; Birchall v. Griggs, *supra*; Courtney v. Eighth Ward Bank, 154 N. Y. 688, 49 N. E. 54; Rudolph v. Saunders, 111 Cal. 233, 43 Pac. 619; Latham v. Blake, *supra*; Hayden v. National Bank, 130 N. Y. 146, 29 N. E. 143; McLaughlin v. Alexander, 2 S. D. 226, 49 N. W. 99.

Appellant acquired no lien by the attachment proceedings, because the words "real property" used in the statute impart a legal estate in fee simple. Comp. Laws 1913, §§ 5249, 5250, 7547, 7691, ¶ 1; 3 Kent, Com. 401 to 403; Murphy v. Superior Ct. 138 Cal. 69, 70 Pac. 1070; Fretwell v. McLemore, 52 Ala. 145; Bates v. Sparrell, 10 Mass. 325; Meni v. Rathbone, 21 Ind. 454; Scogin v. Perry, 32 Tex. 21; Cummings v. Duncan, 22 N. D. 534, 134 N. W. 712, Ann. Cas. 1914B, 976; Phoenix Min. & Mill. Co. v. Scott, 20 Wash. 48, 54 Pac. 777; Dickerson v. Nelson, 4 Ind. 160; Jeffries v. Sherburn, 21 Ind. 112; Harrington v. Sharp, 1 G. Greene, 131, 48 Am. Dec. 365.

Further than this, and as another reason, because the interest of the holder of the contract of sale was personal property. Cummings v. Duncan, 22 N. D. 535, 134 N. W. 712, Ann. Cas. 1914B, 976; Miller v. Shelburn, 15 N. D. 182, 107 N. W. 51; Pom. Eq. Jur. § 367; Bogart v. Perry, 1 Johns. Ch. 52; Davis v. Williams, 130 Ala. 530, 54 L.R.A. 749, 89 Am. St. Rep. 55, 30 So. 488; Comp. Laws 1913, § 7903, ¶ 3.

These state school contracts create equitable estates and interests in all respects similar to contracts for the sale of land between private parties. Jeffries v. Sherburn, 21 Ind. 112; Martin v. Bryson, 31 Tex. Civ. App. 98, 71 S. W. 615; Wilder v. Haughey, 21 Minn. 101; Poole v. French, 71 Kan. 391, 80 Pac. 997; Allen v. Caldwell, 55 Mich. 8, 20 N. W. 692; Robertson v. Howard, 82 Kan. 588, 109 Pac. 697; Brooke v. Eastman, 17 S. D. 339, 96 N. W. 699; Cummings v. Duncan, 22 N. D. 534, 134 N. W. 712, Ann. Cas. 1914B, 976.

The legislature may classify property or define a given term differently in the different Codes, to give effect to a purpose which it has in mind in dealing with a given subject-matter. Missouri, K. & T. R. Co. v. Miami County, 67 Kan. 434, 73 Pac. 103; Lewis v. Glass, 92 Tenn. 147, 20 S. W. 571; Stull v. Graham, 60 Ark. 461, 31 S. W. 46.

Cases which hold that a vendee's equity under an executory contract of purchase may be levied upon and sold on execution as real estate are under statutes not like our statutes, and here lies the distinction. Kan.

Gen. Stat. 1889, § 6687, ¶ 8; Minn. Rev. Laws 1905, § 5514, ¶ 9; Miller's Rev. Code (Iowa) 1888, § 45, ¶ 8; How. Anno. Stat. (Mich.) 2d ed. § 2, ¶ 9; *Re McCabe*, 29 Mont. 28, 73 Pac. 1106.

Only a mere right in equity coupled with possession is created in the vendee by such a contract, and does not constitute a leviable interest. *Jeffries v. Sherburn*, 21 Ind. 112; *Bremseth v. Olson*, 16 N. D. 242, 13 L.R.A. (N.S.) 170, 112 N. W. 1056, 14 Ann. Cas. 1155; *Dieter v. Fraine*, 20 N. D. 484, 128 N. W. 684; *McKee v. Wilcox*, 11 Mich. 359, 83 Am. Dec. 743; *Spencer v. Geissman*, 37 Cal. 96, 99 Am. Dec. 248.

Further than what has been said, the levy was void because the property was personal property and was not levied on as such, as by law provided. *Comp. Laws 1913*, § 7547; *Ireland v. Adair*, 12 N. D. 29, 102 Am. St. Rep. 561, 94 N. W. 766; *Birchall v. Griggs*, 4 N. D. 305, 50 Am. St. Rep. 654, 60 N. W. 842; *Penoyer v. Kelsey*, 150 N. Y. 77, 34 L.R.A. 248, 44 N. E. 788; *Van Norman v. Circuit Judge*, 45 Mich. 204, 7 N. W. 796; *McLaughlin v. Alexander*, 2 S. D. 226, 49 N. W. 99; *Courtney v. Eighth Ward Bank*, 154 N. Y. 688, 49 N. E. 54; *Rudolph v. Saunders*, 111 Cal. 233, 43 Pac. 619; *Gow v. Marshall*, 90 Cal. 565, 27 Pac. 422; *McBride v. Fallon*, 65 Cal. 301, 4 Pac. 17; *Latham v. Blake*, 77 Cal. 646, 20 Pac. 417, 18 Pac. 150; *Perry v. Hayward*, 12 Cush. 344; *Lederer v. Rosenthal*, 99 Wis. 235, 74 N. W. 971; *Hayden v. National Bank*, 130 N. Y. 146, 29 N. E. 143; *Williams v. Baynes*, 84 Ga. 116, 10 S. E. 541; *Wight v. Barnstable*, 123 Mass. 183; *Bird v. Burgsteimer*, 100 Ga. 486, 28 S. E. 219; *Greentree v. Rosenstock*, 61 N. Y. 583; *Grover v. Fox*, 36 Mich. 453; *Tullis v. Brawley*, 3 Minn. 277, Gil. 191; *Swart v. Thomas*, 26 Minn. 141, 1 N. W. 830; *Re Flandrow*, 84 N. Y. 1.

A judgment roll properly filed and the judgment docketed and recorded, such judgment becomes a lien upon the debtor's real estate, except his homestead.

The interest of the judgment debtor here was merely an equitable estate, an estate known to and recognized by courts of equity alone. *Comp. Laws 1913*, § 7691; *Cummings v. Duncan*, 22 N. D. 534, 134 N. W. 712, Ann. Cas. 1914B, 976; *Smith v. Ingles*, 2 Or. 43.

Neither at common law nor under our statutes is such an interest affected by the docketing of a judgment. *Phoenix Min. & Mill. Co.*

v. Scott, 20 Wash. 48, 54 Pac. 777; Disborough v. Outcalt, 1 N. J. Eq. 298; Bogart v. Perry, 1 Johns. Ch. 56; Potter v. Couch, 141 U. S. 296, 35 L. ed. 721, 11 Sup. Ct. Rep. 1005; Bates v. Ledgerwood Mfg. Co. 130 N. Y. 200, 29 N. E. 102; Wilson v. Beard, 19 Ala. 629; Gorham v. Arnold, 22 Mich. 247; Green v. Hill, 101 Ga. 258, 28 S. E. 692.

No lien on the land was created. Comp. Laws 1913, § 5594; Mott v. Holbrook, 28 N. D. 251, 148 N. W. 1061; Hunter v. Coe, 12 N. D. 505, 97 N. W. 869; Ildvedsen v. First State Bank, 24 N. D. 227, 139 N. W. 105.

One who deals with land is bound at his peril to know who is in possession, and is chargeable with notice of the occupant's rights. But he may show that upon due and reasonable inquiry made he failed to discover any legal or equitable occupant. Krause v. Krause, 30 N. D. 54, 151 N. W. 991; Betts v. Letcher, 1 S. D. 182, 46 N. W. 193; Thompson v. Pioche, 44 Cal. 516; Scheerer v. Cuddy, 85 Cal. 270, 24 Pac. 713; Pom. Eq. Jur. §§ 614, 615, 618; Beattie v. Crewdson, 124 Cal. 577, 57 Pac. 463.

And the burden is on him to show that he did not have notice of these rights. Beattie v. Crewdson, 124 Cal. 577, 57 Pac. 463; Scheerer v. Cuddy, 85 Cal. 270, 24 Pac. 713; Pell v. McElroy, 36 Cal. 269; Wilhoit v. Lyons, 98 Cal. 409, 33 Pac. 325; Betts v. Letcher, 1 S. D. 193, 46 N. W. 193.

The respondent was, when the execution was levied, and had been for a long time prior, actually working and farming the land in question. He was exercising acts of ownership and dominion over it, customary and usual to obtain the benefits of the use for which the lands were best suited. Nearing v. Coop, 6 N. D. 345, 70 N. W. 1044; Quaschneck v. Blodgett, 32 N. D. 603, 156 N. W. 216; Giddings v. '76 Land & Water Co. 83 Cal. 96, 23 Pac. 196; Hunter v. Coe, 12 N. D. 505, 97 N. W. 869; Grover v. Fox, 36 Mich. 453.

BRUCE, J. This is an action to have an assignment of a school-land contract declared a mortgage and for the foreclosure of the same. The controversy, however, is between the assignor or mortgagor, W. M. Miracle, and his assignee, the plaintiff, Herman E. Sox, and the de-

fendant Dodson, Fisher, Brockman Company, which claims under an alleged prior attachment.

On November 22, 1905, the certain school land in controversy was sold by the state of North Dakota to one James E. Brady under the usual executory contract for the sale of school lands. On April 25, 1909, Brady assigned this contract to the defendant W. W. Miracle, who thereupon went into the possession of the premises and remained in the actual, open, and notorious possession thereof until after the levy of the attachment hereinafter mentioned. On January 8, 1910, this assignment was presented to the county auditor of La Moure county, who indorsed thereon, "Taxes paid and transfer entered this 8th day of January, 1910." On January 21, 1910, this assignment was approved by the Board of University and School Lands.

On December 31, 1909, the defendant W. W. Miracle executed and delivered a promissory note for \$1,000, with interest at 12 per cent until paid, to the plaintiff Herman E. Sox, and to secure the same, and on the said date, assigned to the said plaintiff, Herman E. Sox, the certain school section of land. This assignment was in all essentials a mortgage, and provided that W. W. Miracle should pay the taxes, and, in case of his nonpayment of the interest and taxes, the plaintiff might pay the same, and in which event such payments would draw 12 per cent interest. This assignment, however, was not presented to the county auditor for entry until July 9, 1913, nor approved by the Board of University and School Lands until July 14, 1913, nor recorded with the register of deeds until August 22, 1913.

It is this note of \$1,898.34 given by M. W. Miracle to Herman E. Sox which is sued upon in the action before us, and the lien created by which is sought to be foreclosed. The right of this foreclosure seems to be unquestioned, as the defendant M. W. Miracle defaulted, not only in the payment of taxes, but in the payment of interest. Prior to the beginning of the action, however, but after the assignment by M. W. Miracle to the plaintiff, Sox, or, the execution of what to all intents and purposes was a mortgage by M. W. Miracle and W. W. Miracle to the said Herman E. Sox, and on the 25th day of April, 1911, the defendant Dodson, Fisher, Brockman Company, sued the defendant W. W. Miracle on an account, and on said day and in support of said suit attempted to levy an attachment upon said land; said action coming to

judgment and an execution being issued on the 15th day of March, 1913, against the said W. W. Miracle and delivered to the sheriff, who made a return thereon of no personal property found, and then, and on the 17th day of March, attempted to levy the same on the school land in question, and on the 17th day of March filed his notice of levy in the office of the register of deeds in and for La Moure county, and later, and on the 25th day of April, 1913, made a purported sale of said land, at which the defendant Dodson, Fisher, Brockman Company was the purchaser, and issued to the said Dodson, Fisher, Brockman Company a sheriff's certificate of sale.

The main question in controversy is the validity of these attachment proceedings and of this sheriff's sale.

The trial court found them to be void, and entered judgment for the foreclosure of the mortgage lien of the plaintiff, Herman E. Sox, and it is from this judgment that the defendant Dodson, Fisher, Brockman Company appeals and asks for a trial *de novo*.

Later and on the 9th day of March, 1910, the defendant W. W. Miracle gave to the plaintiff, Herman E. Sox, another note for \$500 also taking security on the school section in question. When the said notes became due, the defendant W. W. Miracle was unable to pay the same, and on the 1st day of April, 1912, he and his wife, Maggie Miracle, entered into an agreement with the defendant M. W. Miracle by which the said M. W. Miracle agreed to assume the payment of said notes, and, in consideration of such assumption the said W. W. Miracle, and on the said 1st day of April, 1912, transferred to said M. W. Miracle all his interest in the school-land contract. On or about the same date and in furtherance of this agreement, the defendant M. W. Miracle executed and delivered to the plaintiff, Herman E. Sox, a promissory note for \$1,898.34, being the amount due on the notes of \$1,000 and \$500 before referred to, and given by W. W. Miracle—said note being payable on the 1st day of November, 1912, and drawing interest at 12 per cent—it being also agreed by the said contract that the land in question should stand and be retained by the plaintiff, Herman E. Sox, as security for the payment of this note as had before been agreed upon by the defendant W. W. Miracle and the plaintiff, Herman E. Sox.

Stated another way the crucial question is whether the defendant

Dodson, Fisher, Brockman Company acquired rights by their levy under their attachment against the property in question superior to the claims of Sox and M. W. Miracle. Sox claims under an assignment from W. W. Miracle bearing date December 31, 1909, but not presented to the county auditor for entry until July 9, 1913, and not approved by the Board of University and School Lands until July 14, 1913, and not recorded with the register of deeds until August 22, 1913. M. W. Miracle claims under an assignment from W. W. Miracle and wife, dated April 1, 1912. The attachment was levied on May 25, 1911.

In the attachment proceedings the interest of W. W. Miracle under the school-land contract was levied upon and treated as real property belonging to said W. W. Miracle.

Practically the whole controversy revolves around the conclusion of the trial court that the levy under the attachment was void. It is claimed by the plaintiffs and respondents, and no doubt was held by the trial court, that W. W. Miracle's interest under the contract was not an interest in the land, and hence could not be levied upon in the manner provided by law for a levy on real property. Section 7547 provides how attachments may be levied. Subdivision 1 of the section relates to real property, and subdivision 4 to personal property. Subdivision 1 provides that "levy under a warrant of attachment must be made as follows:

"1. Upon real property, by the sheriff's filing with the register of deeds of the county in which the property is situated, a notice of the attachment subscribed by him, stating the names of the parties to the action, the amount of the plaintiff's claim as stated in the warrant and a description of the property levied upon, which notice must be recorded and indexed by the register of deeds in like manner and in the same book as a notice of the pendency of an action."

Subdivision 2 provides for a somewhat similar method in the case of "personal property which by reason of its bulk or other cause cannot be immediately removed, by the sheriff's filing with the register of deeds a notice of the same kind as described in subdivision 1 of this section, and upon range stock."

Subdivision 3 provides for the levy on personal property which is capable of manual delivery, and subdivision 4 provides for the levy:

"Upon other personal property by leaving a copy of the warrant and

a notice showing the property attached with the person holding the same; or, if it consists of a demand other than as specified in the last subdivision, with the person against whom it exists."

It is conceded by the appellants that the attachment creditor in the case at bar proceeded under subdivision 1 by filing a notice of levy with the register of deeds, and by serving a copy of the warrant and of the notice of levy on the occupant. The respondents contend that this attempted levy was wholly ineffective to create a lien, because the defendant W. W. Miracle, having only an executory contract of purchase, was not the owner of real property within the meaning of those words as used in § 7547, subdiv. 1.

The contention of the defendant and appellant, Dodson, Fisher, Brockman Company, is that the interest was real estate and was properly levied upon as such. It also maintains that even if not technically real estate the statutes which specifically deal with school-land contracts provide that the levy shall be made as if it were.

It calls attention to § 314, Compiled Laws of 1913, which provides: "Contracts of purchase, issued pursuant to the provisions of law, entitle the purchaser, his heirs or assigns, to the possession of the lands therein described, to maintain actions for injuries done to the same, or any action or proceeding to recover possession thereof, unless such contract has become void by forfeiture; and all contracts of purchase in force may be recorded in the same manner that deeds of conveyance are authorized to be recorded."

It calls attention to the fact that this provision gives the purchaser the right to maintain actions for injuries to the property purchased. It asks why should the law have given this right if it did not intend to vest in the holder some estate in the land?

It further calls attention to the fact that § 315 of the Compiled Laws of 1913 is an amendment of § 31 of chapter 118 of the Laws of 1893. That this section, being § 198, Rev. Codes 1899, originally merely provided that "the legal assignees of all bona fide purchasers of any of the lands mentioned in this act are subject to and governed by the provisions of law applicable to the respective purchasers of whom they are assignees; and they shall have the same rights in all respects as original purchasers of the same class of lands."

It says, however, that this section was amended in 1907 so that §

315 of the Compiled Laws of 1913 now reads: "Each assignee of a bona fide purchaser of any of the lands mentioned in this article is subject to and governed by the provisions of law applicable to the purchaser of whom he is assignee, and he shall have the same rights in all respects as an original purchaser of the same class of lands. The interest of a purchaser of any of the lands mentioned in this article that shall have been heretofore or may hereafter be levied upon or attached in any action brought to recover a debt due from said purchaser of said lands and the interest of said purchaser which has heretofore been or may hereafter be sold under execution and a certificate of sale may have been or shall hereafter be issued by the sheriff of the county to the party buying at said sale the interest of said purchaser of said lands and after the expiration of one year from the date of sale, the buyer of the interest of said purchaser of said lands may present to the land commissioner of this state a certificate of the sheriff of the county in which the land is situated showing said sale and the name and address of the person buying thereat and also showing that one year has elapsed between the date of sale of said land and the date of making said certificate, also showing that no redemption has been made by the purchaser of said land, his assignee or successor in interest or anyone in behalf of either and showing that no claim of homestead has been made to said land by anyone. On the filing of said certificate in the office of the land commissioner of the state of North Dakota the said land commissioner shall subrogate the person who bought the interest of the purchaser of said lands at said sale, to the contract of purchaser and to all rights of said purchaser of said lands in and to said lands and said person so subrogated shall carry out and perform said contract of purchase with said state in all particulars, and at the expiration of said contract and on the full performance thereof, the person so subrogated shall receive from the state of North Dakota a deed to said land."

Counsel for appellant argues that this amendment must have been passed for some useful purpose, and that useful purpose was to define the rights of purchasers at execution sales. He argues that the statute says that the interest of the contract holder may be "levied upon or attached," and in case the interest be sold under execution and a certificate of sale may have been or shall hereafter be issued by the sheriff of the county to the party buying at said sale the interest of said purchaser

of said lands, and after the expiration of one year from the date of sale, the buyer may present a certificate of the sheriff showing, among other things, "that no redemption has been made by the purchaser of said land, his assignee, or successor in interest, or anyone in behalf of either, and showing that no claim of homestead has been made to said land by anyone, and thereupon the purchaser at the execution sale will be subrogated to the rights of the original purchaser."

If, he argues, the interest levied upon is not a real property interest, why should this amendment have been passed? *Why should there be a year for redemption? Why should there be evidence submitted that no claim of homestead had been made to said land?*

He argues in short that whatever the rule may be as to the interest of a vendee under an ordinary executory contract for the purchase of land, there can be no question as to the interest of a purchaser under a school-land contract, and that the statutes in relation of these school-land contracts make that interest a real-property interest.

The question before us is one of statutory construction. And first what is the meaning of the word "*real property*" as used in subdivision 1 of § 7547?

What is the meaning of the term "other personal property" as used in subd. 4?

Section 5248, Compiled Laws 1913, classifies property as: (1) Real or immovable; (2) personal or movable.

Section 5249 defines real or immovable property, and says that it consists of: (1) Land; (2) that which is affixed to land; (3) that which is incidental or appurtenant to land; (4) that which is immovable by law.

Section 5250 defines land as "the solid material of the earth, whatever may be the ingredient of which it is composed, whether soil, rock, or other substance."

Section 5251 defines the term "affixed" as follows: "A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls, or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws."

Section 5252 defines the term "incidental or appurtenant" as follows:

"A thing is deemed to be incidental or appurtenant to land, when it is by right used with the land for its benefit: as in the case of a way, or water course, . . . or heat from or across the land of another. Sluice boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills and all other machinery or tools used in working or developing a mine are to be deemed affixed to the mine."

Section 5253 defines the term "personal property" as follows: "Every kind of property that is not real is personal."

It will be noticed that these definitions divide property into the two arbitrary classes of "real" and "personal," and that in North Dakota what is generally called "mixed property" is unknown.

Again in the Code and in the Chapter on "Definitions and General Provisions" we find the following:

Section 7279. "Whenever the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase wherever it occurs, except when a contrary intention plainly appears."

Section 7309. "The following words also have the signification attached to them in this section unless otherwise apparent from the context: (1) The word 'property' includes property, real and personal; (2) the words 'real property' are coextensive with lands, tenements and hereditaments; (3) the words 'personal property' include money, goods, chattels, things in action and evidences of debt."

What, then, is the meaning of the terms, "tenements and hereditaments?" This is all we need to inquire about, as § 5250 has already defined "land" to be "the solid material of the earth." For this meaning we have to go to the definition of the common law, and there can be no question that at the common law the property levied upon in this case was personal and not real property.

"Things real," says Chancellor Kent, "consist of lands, tenements, and hereditaments. The latter is a word almost as comprehensive as property, for it means anything capable of *being inherited*, be it corporeal, incorporeal, real, personal, or mixed. The term 'real estate' means an estate in fee or for life in land, and does not comprehend terms for years or any interest short of a freehold. A tenement comprises everything which may be holden, so as to create a tenancy, in the feudal sense of the word, and no doubt it includes things incorporate, though they do not lie in tenure. Corporeal hereditaments are confined to land,

which, according to Lord Coke, includes not only the ground or soil, but everything which is attached to the earth, whether by the course of nature, as trees, herbage, and water, or by the hand of man, as houses and other buildings; and which has an indefinite extent, upwards as well as downwards, so as to include everything terrestrial, under or over it. Incorporeal tenements and hereditaments comprise certain inheritable rights which are not, strictly speaking, of a corporeal nature or land, although they are, by their own nature, or by use annexed to corporeal inheritances, and are rights issuing out of them, or concern them. They pass by deed, without livery, because they are not tangible rights. . . . The incorporeal hereditaments which subsists by our law are fewer than those known and recognized by the English law." [3 Kent, Com. 401, 402.] See also 5 Mod. Am. Law, 2; 6 Mod. Am. Law, 6, § 9.

The property which was levied on was then at the common law and under the definitions contained in the North Dakota Codes not real estate, but a mere chose in action and therefore personal property.

On this subject, Pomeroy in § 367 of his work on Equity Jurisprudence says: "What is the effect at law of a contract whereby the owner agrees to sell and convey a designated tract of land, but which is not a true conveyance operating as a present transfer of the legal estate and the legal seisin? It is wholly, in every particular, executory, and produces no effect upon the respective estates and titles of the parties, and creates no interest in, nor lien or charge upon, the land itself. The vendor remains to all intents the owner of the land; he can convey it to a third person free from any legal claim or encumbrance; he can devise it in the same manner; on his death intestate it descends to his heirs. The contract in no manner interferes with his legal right to and estate in the land, and he is simply subject to the legal duty of performing the contract, or to the legal liability of paying such damages for its nonperformance as a jury may award, which are collectable from his property generally. On the other hand, the vendee acquires no interest nor property right whatever; he can maintain no proprietary nor possessory action for its recovery. His right is a mere thing in action to recover compensation in damages for a breach from the vendor, and his duty is a debt,—an obligation to pay the stipulated price; on his death both this right and this duty pass to his personal representatives, and not to his heirs. In short, the vendee obtains at law no real prop- erty

nor interest in real property. The relations between the two contracting parties are wholly personal. No change is made until by the execution and delivery of a deed of conveyance the estate in the land passes to the vendee." See also *Bogart v. Perry*, 1 Johns. Ch. 52; *Davis v. Williams*, 130 Ala. 530, 54 L.R.A. 749, 89 Am. St. Rep. 55, 30 So. 488.

This is the nature of the school-land contract in question. The title is retained by the state until the terms of the contract have been fully performed as well as the right to cancel upon a breach of its terms by the vendee. There is no essential difference between a school land and any other executory land contract. *Jeffries v. Sherburn*, 21 Ind. 112.

In both cases the purchaser becomes the beneficial owner in equity, and the vendor retains the legal title in trust for such vendee. *Woodward v. McCollum*, 16 N. D. 42, 111 N. W. 623; *Clapp v. Tower*, 11 N. D. 556, 93 N. W. 862; *Pom. Eq. Jur.* § 105.

We have held, however, that an executory land contract "produces no effect upon the respective estates and titles of the parties, and creates no interest in, nor lien or charge upon, the land itself. The vendor remains to *all intents the owner of the land*; he can convey it to a third person free from any legal claim or encumbrance. . . . *In short, the vendee obtains at law no real property nor interest in real property.* The relations between the two contracting parties are wholly personal." And that, therefore, § 7691, Compiled Laws of 1913, being § 7082, Rev. Codes 1905, which provides that a judgment when docketed "shall be a lien on all the real property, etc.," creates no lien on the mere equitable estate or interest of the judgment debtor in real property. *Cummings v. Duncan*, 22 N. D. 534, 134 N. W. 712, Ann. Cas. 1914B, 976.

But counsel, in support of his contention that the property in question was real as opposed to personal property, calls our attention to § 10,368, Comp. Laws 1913, which provides that: "The term 'real property' includes every estate, interest and right in lands, tenements and hereditaments."

This definition, however, is to be found in the Penal Code, and nowhere else, and is directly opposed to the definitions elsewhere given and to which we have before referred. It must be taken in connection with § 10,356, Comp. Laws 1913, also a part of the Penal Code, which

provides that: "Whenever the terms mentioned in the following sections are employed in this Code, they are deemed to be employed in the senses hereafter affixed to them, except when a different sense plainly appears."

It plainly relates to the Criminal Code alone, and its purpose was clearly to merely give persons in the possession of real property the protection of the criminal laws no matter what their tenure or title might be.

He then cites a number of cases, none of which, however, when closely analyzed, are applicable here.

Of these the case of *Simonson v. Wenzel*, 27 N. D. 638, L.R.A.—, —, 147 N. W. 804, involved the recording act merely, and the construction of the word conveyance as used in that instrument. The question was whether that word included a mortgage on the executory interest of a purchaser under a land contract.

It is true that by way of *dicta* we intimated that the vendees' interest was real property, but the case really turned on the definition of the word "conveyance" which was contained in the recording act. Section 5039, Rev. Codes 1905, being § 5595, Comp. Laws 1913, provided that: "The term 'conveyance' as used in the last section, embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged or encumbered, or by which the title to any real property may be affected, except wills and powers of attorney."

The land contract in question in that case, and the mortgage thereon, even if they did not convey real property, certainly conveyed an equitable *interest* therein, and certainly *affected* the title. Nor can there be any doubt that this interest could be levied upon or sold, and the case did not decide, nor was it necessary that it should decide, whether it should be so levied upon and sold as personal or as real property.

The case of *Simonson v. Wenzel*, indeed, did not attempt to overrule the prior case of *Cummings v. Duncan*, 22 N. D. 534, 134 N. W. 712, Ann. Cas. 1914B, 976, and the two decisions must be taken together. We held in *Cummings v. Duncan* that the interest of the purchaser under the land contract was a mere *equitable estate or interest*. Being such an interest and an interest which affected the title, it was a conveyance under the terms of the recording act in the case of *Simonson*

v. Wenzel. We held in the Cummings' Case, however, that it was not real property, and the ruling in the Simonson Case in no way repudiated that holding.

The same distinction is to be found when we come to compare the case of Cummings v. Duncan with the cases from other jurisdictions which are cited by counsel for appellant. All of these cases which are at all applicable were decided under peculiar statutes which differ materially from our own.

The cases of Robertson v. Howard, 82 Kan. 588, 109 Pac. 697, and Poole v. French, 71 Kan. 391, 80 Pac. 997, merely construed the statutes of Kansas,—and those statutes (Kan. Gen. Stat. 1889, § 6687, ¶ 8) expressly provided that “the word ‘land’ and the phrases ‘real estate’ and ‘real property’ include lands, tenements and hereditaments, and all rights thereto and interest therein, equitable as well as legal.”

In the case of Hook v. Northwest Thresher Co. 91 Minn. 482, 98 N. W. 463, the statute construed was similar to that of Kansas and read: “The words ‘lands,’ ‘realty,’ and ‘real estate’ shall include lands, tenements, and hereditaments, and all rights thereto and interests therein.” Minn. Rev. Laws 1905, § 5514, ¶ 9.

The case of Shephard v. Messenger, 107 Iowa, 717, 77 N. W. 515, construed a statute which read: “The word ‘land’ and phrases ‘real estate’ and ‘real property’ include lands, tenements, *and all rights thereto and interests therein equitable as well as legal.*” Miller's Rev. Code (Iowa) 1888, § 45, ¶ 8.

And the case of Allen v. Cadwell, 55 Mich. 8, 20 N. W. 692, was based upon a provision which read: “The word ‘land’ or ‘lands,’ and the words ‘real estate’ shall be construed to include lands, tenements, *and real estate*, and all rights thereto and interests therein.” How. Anno. Stat. (Mich.) 2d ed. § 2, ¶ 9.

All that the case of Martin v. Bryson, 31 Tex. Civ. App. 98, 71 S. W. 615, held was that the interest of a vendee in a land contract was a vendible interest which could be levied upon. It did not consider or pass upon or discuss the question as to whether it was real property and should be levied upon as such. This point does not seem to have been raised.

In the case of Brooke v. Eastman, 17 S. D. 339, 96 N. W. 699, the question here involved was eliminated by a stipulation.

Nor are the remaining North Dakota cases which are cited by counsel for appellant in point here.

In *Krause v. Krause*, 30 N. D. 54, 151 N. W. 991, not only was the point in issue here not discussed, but it was not directly involved. It was not an attachment or execution case. The execution proceedings were merely collateral. All that the court held, indeed, was "that while the lien of the judgment would not attach to the equitable interest of the plaintiff, yet after levy and sale it would."

It is true that we held in the case of *Salzer Lumber Co. v. Clafin*, 16 N. D. 601, 113 N. W. 1036, that the interest of a vendee under a land contract could be subjected to a mechanics' lien under the statute which gave a lien to materialmen for materials furnished under a contract with, or with the consent of the owner of land. The section of the Code, however, which granted this lien (Rev. Codes 1905, § 6237, Comp. Laws 1913, § 6814) was followed by § 6248, Comp. Laws 1913, § 6828, which defined the meaning of the term "owner" and provided that "every person for whose immediate use and benefit any building, erection or improvement is made, having the capacity to contract, including guardians of minors or other persons shall be included in the word 'owner' thereof."

The decision in the case was influenced entirely by this latter statute, and on the theory that the lien law should be liberally construed; and that as, under § 6243, Rev. Codes 1905, Comp. Laws 1913, § 6823, all that could be levied upon was the vendees' equitable interest, the vendor's rights as the legal owner were in no way affected. This case surely is not applicable here.

But it is argued that the attachment at any rate constituted a lien on the premises as the original levy antedated W. W. Miracle's sale and assignment of his contract rights to M. W. Miracle. In support of this contention counsel cites § 5594, Comp. Laws 1913.

It is to be noted, however, that this statute only gives an attachment a priority over unrecorded conveyances when that attachment is "at the suit of any party against the person *in whose name the title to such land appears of record*, prior to the recording of such conveyance." § 5594, Comp. Laws 1913.

In the case at bar and at the time of the attachment the record title was not in W. W. Miracle at all, but in the state; and it is clear, there-

fore, that § 5594, Comp. Laws 1913, does not apply. *Lyman v. Gaar, S. & Co.* 75 Minn. 207, 74 Am. St. Rep. 452, 77 N. W. 828; *Coles v. Berryhill*, 37 Minn. 56, 33 N. W. 213; *Lebanon Sav. Bank v. Hollenbeck*, 29 Minn. 322, 13 N. W. 145.

It is clear, also, that prior to the passage of § 5594, Comp. Laws 1913, which amended § 3594, Rev. Codes 1899, attachment creditors were not looked upon as good-faith creditors or protected as such (*Kohn v. Lapham*, 13 S. D. 78, 82 N. W. 408; *Murphy v. Plankinton Bank*, 13 S. D. 501, 83 N. W. 575), and that the attaching creditors' rights are now no greater than such as are expressly conferred by § 5594, Comp. Laws 1913.

The case of *Mott v. Holbrook*, 28 N. D. 251, 148 N. W. 1061, which is cited by counsel for appellant, does not apply, as the record title was in the attachment debtor.

We must then construe the statute in question as considering the interest of the purchaser to be personal property, unless another intention is plainly apparent.

But is there anything in the context of § 315, Comp. Laws 1913, which would intimate that, though personal property, the interest should, as far as the levy of an execution or attachment is concerned, be treated as real estate?

The statute expressly provides that the purchaser "his heirs and assigns" may take possession of the land and "maintain actions for the injuries done to the same;" that the contracts shall be recorded "in the same manner that deeds of conveyance are authorized to be recorded;" that a certificate of sale shall be issued to the purchaser; and that before the right of a purchaser at an execution sale to be subrogated to the rights of the original purchaser shall be complete there shall be a year for redemption and there shall be proof "that no claim of homestead has been made to said land by anyone."

Counsel for appellant argues that the provision that the purchaser is entitled to the possession "of the lands therein described, to maintain actions for injuries done to the same," evidences this intention.

The provision, however, does not in any way change the common law nor make a school-land contract any different from any other land contract, or, as far as that is concerned, from a bailment. One who is in the possession of property under a contract such as that which is

before us has for a long time and everywhere in America as far as we can learn been conceded the right to bring an action in his own name for injuries done both to his possession and to the property possessed, and the statute under consideration adds nothing to his rights in this respect. See 21 Enc. Pl. & Pr. 803; 5 Cyc. 209; 2 Greenl. Ev. 16th ed. § 616; Lawson, Bailm. § 15; *Brewster v. Warner*, 136 Mass. 57, 49 Am. Rep. 5.

Nor do we see any clear expression of that intention in the provision that in case of an execution sale of the interest of the original vendee the purchaser, in order to get a certificate of the assignment of such interest from the state, must make a showing "that no claim of homestead has been made to said land by anyone."

In this particular, land held under a school-land contract is no different than land held under any other land contract, and the statute in recognizing the right to a homestead gives no new rights and adds nothing to the law.

The general statutes which give the right to a homestead and which define the nature thereof, say nothing about the title, and under the decisions of this court the right may be asserted in land to which one has merely an equitable title. It of course cannot be asserted in any case against the vendor in a land contract, for it must at any rate be based on the equitable right, and where the contract is violated no such right exists, but it is otherwise good as against all of the world. It is a protection against creditors indeed, which is given by the law in all cases of homestead possession, irrespective of the nature of the title to the land involved. *Bremseth v. Olson*, 16 N. D. 242, 13 L.R.A.(N.S.) 170, 112 N. W. 1056, 14 Ann. Cas. 1155; *Dieter v. Fraine*, 20 N. D. 484, 128 N. W. 684; *Spencer v. Geissman*, 37 Cal. 96, 99 Am. Dec. 248; *McKee v. Wilcox*, 11 Mich. 359, 83 Am. Dec. 743.

We come, however, to an entirely different conclusion when we examine the provision that "the interest of a purchaser of any of the lands mentioned in this article that shall have been heretofore or may hereafter be levied upon or attached in any action brought to recover a debt due from said purchaser of said lands, and the interest of said purchaser which has heretofore been or may hereafter be sold under execution, and a certificate of sale may have been or shall hereafter be issued by the sheriff of the county to the party buying at said sale the

interest of said purchaser of said lands, and, after the expiration of one year from the date of sale the buyer of the interest of said purchaser of said lands may present to the land commissioners of this state a certificate of the sheriff of the county in which the land is situated showing said sale and the name and address of the person buying thereat, and also showing that one year has elapsed between the date of sale of said land and the date of making said certificate, also showing that no redemption has been made by the purchaser of said land."

We cannot, indeed, read this provision without becoming satisfied that, even though the interest involved was not real estate, the legislature nonetheless determined, and in this statute provided, that as far as a levy or attachment was concerned it should be treated as and considered as such.

We are satisfied, indeed, that the legislature not only intended this, but had the impression, at the time the statute was enacted, that the interest was a real-property interest. The statute in question was enacted in 1893. Up to this time there had been no express determination of this court on the nature of the interest of a vendee under a land contract in North Dakota,—the case of *Cummings v. Duncan* not being decided until January 25, 1912.

The procedure outlined by the legislature is surely in conformity with the procedure which would be adopted if the interest was real estate. It is presumed by the legislature that a certificate of sale will be issued by the sheriff. No such certificate is provided for in the case of personal property. In addition to this it is both presumed and provided that a year of redemption shall exist. No such redemption is provided for or contemplated by the statute in the case of personal property.

The judgment of the District Court is reversed, and the cause remanded, with directions to enter judgment according to the prayer of the defendant and appellant, *Dodson, Fisher, Brockman Company*.

BURKE, J. I concur in result.

GRANT S. YOUMANS v. LOUIS B. HANNA, Andrew Miller, Thomas Hall, S. G. Severtson, Robert E. Barron, Henry E. Byorum, S. J. Rasmussen, James Johnson, George A. McGee, and Dank C. Greenleaf.

(160 N. W. 705.)

Resident attorney of record — stipulation in writing — cause — calendar — advancing on — consent to — supreme court — setting aside — on affidavit based on belief — will not be — authority of attorney — time for preparation.

1. Where the only resident attorney and attorney of record in a lawsuit signs and consents to the filing of a stipulation advancing the cause upon the calendar of the supreme court and setting it for hearing upon a day certain, such stipulation will not be set aside upon an affidavit by him merely to the effect that "he believes" he had no authority to sign the same, and that "he is informed" his nonresident associate counsel would be engaged and unable to prepare the brief, when the facts as to authority and engagements are clearly matters of positive knowledge to his client, and such nonresident counsel, and these persons themselves furnish no proof or affidavits whatever of the facts alleged, and when the court is satisfied that counsel had abundant time for preparation.

Nonresident counsel — practice — courts of North Dakota — not permitted — as matter of right — permission — courtesy — privilege.

2. Nonresident counsel are not permitted to practice in the courts of North Dakota as a matter of right, but as a matter of permission and privilege merely.

State banking board — objectionable securities — should order them removed — depositors — safety of — considered.

3. It is the duty of a state banking board to require a bank to remove objectionable securities where, in its opinion, the safety of the depositors requires it.

State board — action of — justification — members — motives — immaterial — public duty — performance of — no liability for.

4. Where such board takes such an action and is justified by the facts in doing so, the motives of its members are immaterial, since no liability can be based upon the performance of a clear and positive public and official duty.

State board — action of — banker — grievance — objectionable securities — order to remove them from bank — courts — application to — relief.

5. If a banker feels aggrieved at the action of the State Banking Board in requiring him to remove objectionable securities, he should apply to the courts to have such order set aside under the provisions of ¶ 3, § 5146, Comp. Laws, 1913. Unless this is done such order will remain in force and be effective.

Lawful act — nuisance — harmful — banking stock — purchase of — by a number of persons — joining together.

6. Except where the members engaged make what would otherwise be a lawful and innocent act a nuisance and harmful, what one may do singly a number may do together. The mere fact that a number of persons join together in making a purchase of banking stock upon terms and conditions which would have been perfectly lawful for one to do by himself does not render such transaction unlawful.

Conspiracy — gist of action — damages — maintenance of.

7. The gist of the action of conspiracy is damage, and where no damage is proved the action cannot be maintained.

State banking board — order of — removing objectionable securities — failure to comply — closing bank — lawful act.

8. An order of the state banking board requiring the Savings Deposit Bank, of Minot, to remove objectionable securities, and closing the bank on account of the failure so to do, *held* to have been lawful and valid.

Bank — controlling stock — purchase of — after bank has been closed — valid — lawful — transaction.

9. The purchase of the controlling stock in the said bank by certain of the defendants after it had been closed *held* to have been a valid and legal transaction.

On Motion to Vacate Order Denying Rehearing.

(161 N. W. 797.)

Supreme court — justices disqualified — district judges — called in to sit — are supreme court justices — for all purposes in case — power — authority.

10. A judge of the district court who is called to sit in the place of a justice of the supreme court becomes, when he reports for duty and enters upon the discharge of his duties pursuant to such call, for all purposes in the case in which he is so called, a justice of the supreme court, and is vested with the same power and authority as though he had been regularly elected and qualified to fill the office of justice of the supreme court.

District court judges — acting as supreme court justices — decisions of — same as though rendered by the supreme court justices elected — number of district judges so acting — consideration — entitled to same.

11. A decision promulgated by district judges, so called, is the decision of the supreme court of North Dakota, and entitled to the same consideration as though it had been promulgated by a like number of regularly elected justices of the supreme court.

Public — third persons — de facto officers — acts of — scope of assumed official authority — valid — same as acts of officers de jure — judicial officers — rule applies.

12. So far as the public and third persons are concerned, the acts of officers *de facto*, performed by them within the scope of their assumed official authority, are generally as valid and binding as if they were the acts of officers *de jure*. And this rule applies with full force to judicial officers.

Supreme court — de facto justices of — who are — circumstances.

13. For the reasons stated in the opinion, it is *held*, that Justices Fisk, Burke, and Goss were unquestionably *de facto* justices of the supreme court of North Dakota during the month of December, 1916, and consequently their official acts during that time were valid.

Supreme court — final order of — in cause on appeal — remittitur — to lower court — judgment entered on therein — jurisdiction — supreme court has lost — recall — reinstatement of case — no such power — exception — fraud or mistake.

14. When the supreme court has entered a final order in a cause brought there on appeal, and the remittitur has been transmitted to, and judgment entered thereon in, the court below, the supreme court loses jurisdiction to recall the remittitur and reinstate the cause, unless the order directing the issuance of the remittitur was based on fraud or mistake of fact.

Opinion filed December 2, 1916. Rehearing denied December 28, 1916.

Appeal from the District Court of Ward County, *W. J. Kneeshaw*, Special Judge.

Action of conspiracy.

Judgment for defendants. Plaintiff appeals.

Affirmed.

Statement of facts by BRUCE, J.

This is an appeal from a judgment of the district court of Ward county which was rendered for the defendants on a directed verdict.

The amended complaint was as follows:

The plaintiff, appellant herein, in his complaint in this action, asserts and states with other facts that:

1. Heretofore and during the year 1909, the plaintiff, Grant S. Youmans, organized and established the Savings Deposit Bank of Minot, North Dakota. The said bank was incorporated under the laws of North Dakota with a capital stock of \$35,000, all of which was paid

for and owned by the plaintiff, with the exception of twenty shares, ten shares of which were issued to George A. McGee. License and lawful authority to operate as a bank was duly issued to said Savings Deposit Bank by the state of North Dakota in the year 1909, and the plaintiff as the owner of the majority stock and executive officer of said bank operated it as a going concern continuously from the date of its organization up to and until the said bank was closed by the defendants, and the ownership of the three hundred thirty shares of stock of said bank were taken from the plaintiff in the month of October, 1913, in the manner and by the scheme, device, and conspiracy hereinafter more specifically set forth.

2. In the year 1913, when the events described herein took place, the defendant L. B. Hanna was governor, the defendant Thomas Hall was secretary of state, the defendant Andrew Miller was attorney general, and the defendant S. G. Severtson was chief examiner of banks, all of the state of North Dakota, and by virtue of their said respective offices the defendants Hanna, Hall, and Miller constituted the state banking board of that state, and the defendant Severtson was secretary of said board.

3. During this period, and when the conspiracy to ruin plaintiff and take said Savings Deposit Bank away from him was made and carried out, and during the year 1913, the defendant Robert E. Barron was the cashier, the defendant Henry E. Byorum was the assistant cashier, the defendant James Johnson was the vice president, and the defendant S. J. Rasmusson was the general utility man, political agent, and go-between of the Second National Bank of Minot, North Dakota. During the same time the defendant D. C. Greenleaf was the agent in the Commercial Club of Minot of the political machinery of the said defendants in office, and the agent of the large employers of labor in said Minot, North Dakota. Each of these interests were at that time involved in the labor troubles in which the defendant bankers also participated, as parties to said conspiracy.

4. At the time of the assault upon the plaintiff and the taking of his bank as hereinafter more specifically set forth, the defendant George A. McGee was plaintiff's attorney, and the plaintiff had no knowledge of said McGee's perfidy and betrayal until after the consummation of said

conspiracy in which said McGee also participated, as set out in detail herein.

5. The defendants' hostility to plaintiff had inception in the envy and greed of the defendant bankers, who resented plaintiff's fairness and generosity in paying his depositors 5 per cent per annum interest on their deposits, which the prevailing rates of interest at that time and place justified. The envy and hostility on the part of the rival bankers was intensified and spread to all of the defendants in summer of 1912 on account of the plaintiff's sympathy for the down-trodden toilers who were attempting to protect themselves by organization into labor unions, and on account of his efforts in behalf of the right of free speech, in both of which regards plaintiff encountered then and there the determined and bitter opposition of the defendants and each of them in manner and form as narrated in the following paragraph of this complaint.

6. In the spring and summer of 1913 there were many unemployed men in said city of Minot, and general industrial depression as the result of the ruthless manner in which the producers of North Dakota had been exploited by transportation companies as well as by monopolies in control of their markets and market places and of the prices paid for farm products. Certain large contractors and employers of labor in said city of Minot and in the state of North Dakota generally sought to take advantage of the large number of unemployed laborers by depressing the wage scale and by heavier exactions upon their laborers; and to meet this further and unwarranted exploitation and oppression efforts were made to organize these common laborers for their self-protection. In these efforts meetings were held upon the public streets of Minot at which addresses were delivered and arguments made urging united effort and organization on the part of all toiling men. These addresses and arguments publicly made, and the impending projected union and organization of the laboring men of that section, aroused and stimulated the fear of the large contractors and employers of labor, and incurred the bitter hostility and opposition to the effort to organize the workers on the part of those defendants and others who were closely allied politically and financially with said contractors and large employing concerns; and in consequence stern and unlawful methods of repression were adopted in carrying out which the freedom of speech on the public

streets was denied, many of the laboring men and others sympathizing with them were arrested and thrown into jail, and a veritable reign of terror was inaugurated, in which there was much suffering and many starving men. Into these labor troubles of Minot plaintiff was by the resistless demands of his conscience drawn, and he felt impelled to help feed the hungry and release the imprisoned to the extent of his abilities. This humanity on the part of the plaintiff incurred the enmity and malignant hatred of all of the defendants, whose greedy instincts had been aroused and stimulated by the clash with labor, and who looked upon plaintiff, a man of means and a banker, as a traitor to their class and a menace to their coveted and sustained supremacy in the social order.

7. In consequence of the envy, enmity, and greed of the defendant bankers and the fear and hatred of the defendant politicians and office holders, occasioned and stimulated as above set forth, and as the expression thereof, the said defendants in October, 1913, confederated and conspired together and with each other and with others whose names are to plaintiff unknown, for the purpose of wrecking plaintiff's said bank and destroying plaintiff's reputation and influence as a banker and citizen; and in carrying out such unlawful purpose and conspiracy the defendants under color and pretense of public service and by the perversion and abuse of official power and office, but without authority of law, assaulted and took actual possession of said bank and its business, and drove plaintiff out of said bank and business into obscurity, humiliation, and disgrace, and divested plaintiff without right or cause of all of his property and his reputation as a banker.

8. The assault of the defendants upon the plaintiff and his said Savings Deposit Bank was made on or about the 18th day of October, 1913, and was sustained for several days and until plaintiff was driven out of possession of said bank and business, which at the same time was taken and held as their own by the defendants Barron, Byorum, Rasmussen, Johnson, and McGee, in the manner and by the deceits, frauds, threats, pretenses, and proceedings as follows, that is to say:—

On Saturday, October 18, 1913, at about 2:30 in the afternoon of said day, the defendant Severtson, pretending to act in his official capacity as chief bank examiner of North Dakota, and as secretary of the state banking board, but in truth and in fact acting as the agent and under

the directions of all of the defendants as conspirators for the ruin of the plaintiff and the looting of his bank, rushed into the private office of said bank, and peremptorily demanded to examine the loan papers and securities held by the bank. Glancing over a bundle of these loan papers hurriedly, he peremptorily and arbitrarily demanded that these loans to the extent of \$20,000 should be taken out of the bank and \$20,000 in cash put in before 9 o'clock Monday morning following. On the following day, Sunday, in the evening, plaintiff reported to said Severtson, who was at the time in said bank and still pretending to act as bank examiner, that he, the plaintiff, had good prospects of raising the \$20,000 cash demanded on the following morning, whereupon the said Severtson peremptorily and arbitrarily increased his demand for cash from \$20,000 to \$48,000. This demand was outrageously unfair and unwarranted, and was made by said Severtson in deliberate bad faith, and was accompanied by repeated insinuations, in which all of the defendants later joined, that plaintiff had been operating said bank in an unlawful manner, and by divers suggestions that plaintiff had in some manner incurred severe criminal penalties on account of said loans, and by covert threats often repeated that plaintiff would be prosecuted and imprisoned unless these so-called excessive loans, aggregating some \$48,000, were in some way lifted and retired as assets of said bank. These insinuations were false, and these suggestions were fraudulent, and were well known to be false and fraudulent by the defendants and each of them when they were made by them. The plaintiff had done nothing unlawful, and there was nothing fraudulent regarding said loans or any of them. They had been examined by said banking department and permitted to be carried as assets without objection for a period covered by several former examinations. The threats made by the said Severtson and the other defendants to prosecute the plaintiff were made to weaken and intimidate him into a realization that he was in their power and that they could and would take from him not only his bank and his reputation as a banker, but all his other property and his personal liberty as well unless he at once made satisfactory terms with them. These threats frightened plaintiff to a degree that rendered him incapable of successfully resisting defendant's demands that he must surrender without payment to the defendant McGee a note which the said McGee had given plaintiff in payment for ten shares of the capital stock of

said bank, and that he should turn over and yield all of his own and his wife's stock in said bank, being three hundred forty shares thereof, to the said defendant bankers, and give to them a bonus of \$5,000 in addition.

9. On the following Monday, October 20, 1913, the plaintiff being unable to put the \$48,000 of additional cash capital into said Savings Deposit Bank to satisfy the unlawful and fraudulent demands of the defendant Severtson pretending to act as chief examiner of North Dakota, the said Severtson and one of his deputies took actual physical possession of said bank and kept its doors closed, placing a sign on the front door reading as follows: "Bank closed; state examiner in charge." No steps were taken or contemplated by either the chief examiner or the state banking board for the appointment of a temporary receiver of said bank. No receivership or reorganization was needed to protect the depositors of said bank. The plaintiff offered and was prepared within any reasonable time to replace by cash any loan or security held by said bank that the chief examiner saw fit to condemn or question. The said examiner and each of the other defendants knew that said bank was solvent and capable of paying every depositor in full. The sole and only purpose of the said Severtson in closing said bank was to discredit and ruin plaintiff as a banker, and to compel him to yield possession and control of said bank and its assets to the defendants Barron, Byorum, Johnson, Rasmussen, and McGee, and to disarm plaintiff as a political force antagonistic to the defendants Hanna, Miller Hall, Severtson, and Greenleaf.

10. After possession of said Savings Deposit Bank was taken by defendant Severtson under cover of his office as chief bank examiner of North Dakota and under the false pretense of protecting depositors, the said Severtson for several days unlawfully held possession of said bank and all its assets, and conferred day by day with the other defendants, Barron, Byorum, Rasmussen, McGee, Johnson, Hanna, Miller, and Hall, to devise ways and means of stealing, under cover of legal methods, said bank from the plaintiff, and at the same time making him pay \$5,000 for the privilege and benefit of being so robbed by them. While the said Severtson was thus without warrant of law in possession and control of said bank from October 18 to October 23, 1913, the state banking board and the members thereof, with full knowledge of

such possession and of all the facts, took no steps whatever to protect either the depositors or owners of said bank, but suffered and permitted the said Severtson and the other defendants, McGee, Barron, Byorum, Rasmussen, and Johnson, to despoil plaintiff by threats, demands, and frauds above described, and continued by their actions in unlawfully holding said bank to give color and support to said threats and demands.

11. After the plaintiff had been thus forced and intimidated by the defendants into the surrender of said bank and its business to the defendant bankers, and into the surrender to the said McGee of his note for \$1,000, and into the payment of said \$5,000 bonus, the defendants nevertheless for many days continued their slander, vituperation, and abuse of the plaintiff in an attempt to justify the looting of his bank and for the purpose of further weakening his social and political influence. In this campaign of slander and abuse which the defendants waged against plaintiff during their assault on said bank, from October 18 to October 23, 1913, and for some time thereafter, said defendants caused, permitted, and encouraged said Severtson and others to suggest and insinuate to the depositors of said bank and others in Minot and in Bismarck, North Dakota, that the plaintiff was dishonest, that he had tried to swindle said depositors, that he had been carrying illegal papers in its assets for the purpose of looting said Savings Deposit Bank, that he was a very dangerous man and should be driven from the community for the public welfare, although each and every one of these suggestions and insinuations were false and known by the defendants and each of them to be false at the time.

12. After the plaintiff had been coerced and driven into yielding reluctant consent to the so-called reorganization plans formulated and insisted upon by the defendants Barron, Byorum, Rasmussen, and McGee in conference and conspiracy with the defendant Severtson, and on October 23, 1913, submission of the entire matter was made by telephone to the defendants Hanna, Hall, and Miller as the state banking board, and they, without any sort of probe or investigation, hearing or proof, and without warrant or authority of law, conferred by telephone upon one B. J. Schoregge, then a deputy examiner at Minot, North Dakota, full authority to ratify the so-called reorganization and the taking over of said bank and all of its property by said defendant bankers. A pretended approval of the so-called reorganization was on

October 24, 1913, given by the said Schoregge by placing the defendants Barron, Byorum, Johnson, Rasmussen, and McGee in full charge and control and possession of said Savings Deposit Bank as stockholders, directors, and officers thereof, and plaintiff was thereby without consideration and unlawfully divested and shorn of all right, title, interest, and ownership of every nature and description in and to said bank, its assets, business, and good will, and no restitution or return has ever been made or offered to plaintiff therefor by the defendants or any of them.

13. At the time said Savings Deposit Bank and the ownership thereof was wrested from the plaintiff by the defendants as aforesaid, its assets, business, and good will as a going and growing concern were worth on a fair and reasonable valuation \$100,000, and plaintiff was by said taking damaged in the amount of said sum.

14. The threats, insinuations, and abuse directed by the defendants against plaintiff while they were taking said bank away from plaintiff as aforesaid caused plaintiff to suffer great agony and distress of mind and impairment of health, and the shame, humiliation, and disgrace put upon plaintiff by defendants by the forcible and unlawful taking of the Savings Deposit Bank from plaintiff in the manner above described still rests upon plaintiff and retards him in every social, business, and political activity on which his life and happiness depend, to plaintiff's damage in the sum of \$100,000.

15. The plaintiff paid the said defendants the sum of \$5,000 as hereinbefore alleged, and was thereby damaged in said sum.

16. That all and singular the acts done and things performed in the carrying out of said conspiracy by said defendants was by said defendants made, done, and performed by them wilfully and maliciously, and with the intent and purpose of injuring the plaintiff herein.

The answers were general denials.

The instruction of the court which directed the verdict was as follows:—

“The court will instruct you as to that, that a banking board acting in a quasijudicial capacity, and having discretionary—the acts performed by them being partly discretionary and partly judicial; that under the law the banking board, or the members of such board are not liable in damages in this case as a matter of law, and I instruct you that,

in addition to that, we have a statute which provides as follows: Any and all orders made by such board shall be immediately operative and remain in full force until modified, amended, or annulled by such board, or by a court of competent jurisdiction, in an action to be commenced by the party against whom such order may have been issued.

"Under that law the undisputed evidence showing that an order had been made, it is in full force or affect until modified by the board or annulled by a court of competent jurisdiction, and I instruct you that their remedy is to proceed under that statute, and they cannot attack that order at this time in a collateral proceeding such as this is; therefore so far as those four defendants are concerned there was absolutely no evidence in this case whatsoever, or no question of fact that would warrant you in finding a verdict against them.

"Now, then, on the question of the other defendants, it is contended by Mr. Youmans in this case, that the bank examiner went in there and gave him only until Monday morning to raise \$48,000, but the bank examiner claims that it was only \$25,000, and that talking of the \$48,000, he merely gave a memorandum showing there was \$48,000 of objectionable paper, but he did not require him to put back or take out \$48,000, but merely \$25,000. Of course, this is a question of fact, and, in my deciding it, it cuts no figure because if there is any question of fact to be decided by the jury I must submit to it—I have no right to take a case from the jury, if there is any question of fact submitted to them. I merely mention that for this reason, Mr. Youmans contends that the time was too short, that he should have been given a greater time, and it was unreasonable. If that is a fact he should have proceeded under the statute, and gone to court, and had that order set aside, obtained an injunction, and had further time to. But under his own evidence in this case, it shows that the time did not make any difference, because he admits on the stand in this case that he obtained sufficient money to pay off the depositors, or promise of it from his friends, but that he would not take it because he did not want to, because there might be further trouble or might embarrass his friends. The undisputed evidence in this case shows that on or about the 22d day of October this plaintiff entered into a contract with Mr. Barron and Mr. Rasmussen to sell the assets of that bank. The contract shows upon its face what it was. Now the court will further instruct you as a matter

of law that in his opinion there is no question of—there is no evidence in this case that would warrant finding that there was any duress in the obtaining of that contract. It was apparently voluntarily, and, in addition to that, the *undisputed evidence* in this case *shows a subsequent ratification*. But the court further instructs you that, even assuming for the purpose of this case—at least state to you, does not instruct you—that even for the purpose of assuming in this case that there was duress in the case, that he has signed that contract under duress, it would make no difference in this case, for the reason that the contract is there, which has never been set aside by any court, that this is a collateral attack in this case, and it cannot be passed upon in this case; that their remedy would be to set aside that contract in a proper proceeding for that purpose.

“Now, gentlemen of the jury, I cannot refrain from making a few remarks with reference to my coming here, and certain matters that transpired during the trial. I was invited to come here and preside in this case. I did not know at the time I came here what the case was. If I had known what the case was, I assure you I would never have been here. I have endeavored during the time I have been here to try the case honestly and fairly upon my part. It is my duty under the law and under my oath as a judge of this state to decide a case fairly and impartially on the law, and decide all question of law. I have attempted to do so. Lots of evidence has been stricken out and lots of evidence has been rejected, on proper objection. I did so believing that I was acting rightly under the law doing so. I believe I am right. If I were not, they have redress in the supreme court, and it is my fault if I made any mistake in that respect and it is not your fault.

“Now, there are many things that transpired here. I have seen some very disgraceful proceedings by the audience in this case, some things I have never seen in any court of justice before. It indicates to me that there are certain people in this audience—I don’t know who they are—I don’t know at the present time, but during the trial of this case, who must have perverted minds, people who would trample our beautiful flag of stars and stripes, men who are not entitled to live in any community, and I am ashamed of them.

“I have also heard remarks pass while I have been here, meaning that I have been unfair and unjust, that I have not given the plaintiff

a fair show. I have heard remarks of a certain person who stated that, that little judge, before Manahan gets through with him, he would be down on his knees to him, and remarks of that kind.

"Now, gentlemen of the jury, I have endeavored to do my duty as an American citizen honestly, faithfully, and justly in the sight of God, and I am not ashamed of anything that I have done at this trial.

"Another thing that has transpired and I desire as a matter of privilege to speak about it, and that is this, while walking down town to-day after dinner, I walked ahead of a couple of gentlemen whom I am sorry to say are attorneys in this case, and I heard certain remarks. I was with a gentleman who heard them at the same time, stating words to this effect: 'That we will have a meeting in the Opera House next Sunday, and it will be crowded to overflowing, and I will remain here until that time, and we will talk the case over from beginning to end, and we will show them how this case originated.' And the other person with him said, 'Yes, and they are going to have a meeting to-day, and we will do the same thing.' I want to say I am not afraid of them. I am not afraid of a living soul, I am not afraid of any anarchist in this court or this state, and I am prepared to do my duty, as I understand it under my oath, and in the presence of Almighty God. And they cannot bulldoze me or frighten me in any respect. I have no right under the law to usurp the functions of a jury. I have no right to pass upon any question of fact. I have a right to instruct the jury on questions of law, and it is their duty, under their oaths, to accept the law as given by me, and I state to you, gentlemen of the jury, that in my opinion the plaintiff has wholly failed to make a case, that there is no evidence or question of fact to be submitted to you, and I instruct you to find a verdict in favor of the defendants, and will ask one of the jurors to sign the verdict."

The remaining facts will, so far as is necessary, be given in the opinion.

C. B. Davis, James Manahan, and Arthur Le Sueur, for appellant.

H. J. Linde, Attorney General, Assistant Attorneys General, Francis J. Murphy, H. R. Bitzing, and John E. Greene (Palda & Aaker, and W. E. Purcell, of counsel,) for respondents.

BRUCE, J. (after stating the facts as above). No appearance was made by counsel for the appellant on the oral argument, and although a so-called brief was filed, it is entitled to no consideration under the rules and practice of this court. There is no argument upon any of the errors sought to be assigned, nor are the specific objections to the rulings complained of stated, and rule 34 of this court is absolutely ignored. Such as it is, however, the brief contains 378 alleged assignments of error, such as the following: "The court erred in ruling found line 3, page 642, of the transcript," and in addition copies of the pleadings; a copy of the court's direction to the jury and the following paragraphs: "Reserving objection to the advancement of the hearing on this cause and to the limitation imposed for serving and filing briefs herein; still insisting that the order setting this cause for hearing on the merits out of its regular order on the calendar was improvidently made, in violation of the rules and practice of this court, and without authority, knowledge, or consent of appellant; and still protesting that it is a denial of justice and an unwarranted abuse of judicial discretion to impose the impossibility of reviewing the record in this case and discussing the legal points involved within the scant and insufficient time allowed, Grant S. Youmans, plaintiff and appellant, nevertheless, but without waving the foregoing objections and protest, submits these facts, points, exception, authorities, and considerations."

"The reasons assigned by the court for advancing this cause are without foundation either in fact or in law. There is no question of public policy involved, for the acts committed by the officials who are defendants in this action are not acts committed in the regular course of the performance of their duty, nor such as they perform in dealing with other banks, but were a special set of actions concocted for the specific purpose, as detailed in the complaint. No contentions are made in this action on the part of the respondents that similar action is either contemplated or advisable in dealing with other banks, and no contention is maintained by the appellant that the ordinary and usual procedure of the public examiner and the banking board in dealing with other banks is in any wise illegal. So that no procedure and no special construction of the law relating to other public institutions is contended for on either side in this cause. Furthermore, the action on the record as it stands was favorable to the banking board and its construction of the law, so that the public officials cannot contend they are laboring

under any difficulty by virtue of the pendency of this action. It is therefore manifest that no reason exists, either in law or in fact, why this cause should be advanced out of its regular place on the calendar. And it cannot be fairly submitted on the merits in advance of such position on the calendar."

There is, of course, no merit to this objection to the hearing of the case. There was in fact, no appearance of counsel; no motion for a continuance or attempt to have the former orders of this court set aside, but merely a protest. The protest even possesses no merit, and there is not and never has been any showing of a lack of ample time and opportunity for preparation.

The advancement was made because the case was of public interest and involved the conduct, duties, and responsibilities of the state banking board, upon the proper performance of which the safety of the savings and property of hundreds of thousands of depositors depends. But this is not all, it was advanced because counsel for the plaintiff solemnly stipulated that it should be advanced, and themselves stipulated the day on which it should be heard.

This stipulation was made on the 7th day of October, 1916, and was as follows:

IN THE SUPREME COURT,
State of North Dakota, September Term, 1916.

G. S. Youmans,
Plaintiff and Appellant,

vs

L. B. Hanna et al.,
Defendants and Respondents.

On defendant's motion to advance, the court having indicated a willingness to advance the above-entitled action, it is stipulated by counsel for the respective parties, in open court, that the case may be set for argument on November 10, 1916, at 10 o'clock in the forenoon.

C. B. Davis,
Attorney for Appellant.

John E. Greene,
Francis J. Murphy,
Attorneys for Respondents.

Dated Oct. 7, 1916.

It is true that this stipulation was manually signed on the part of the plaintiff by his attorney, C. B. Davis, alone, and that the names of his nonresident counsel, Manahan and Le Sueur, were not signed thereto, but Davis was the only resident attorney and the only attorney of record. He was, in short, the only one of appellant's counsel who, except by courtesy and permission, was entitled to practise in the courts of this state at all; and, as far as the supreme court is concerned, no such permission or extension of courtesy has ever been requested. We are certainly justified in holding and believing that our own lawyers are attorneys and officers of this court, and not mere puppets, and in giving weight and credence to their acts and stipulations.

It is also true that afterwards an attempt was made to set aside this stipulation and to have the argument postponed until December 20, 1916. On this motion, however, the case *was postponed* until November 20, 1916, and even in the most extreme view of the case this postponement was certainly all that the plaintiff was entitled to. C. B. Davis, the only counsel of record for plaintiff and appellant, indeed had, in his affidavit when the case was first advanced and in his opposition to such advancement (and even this opposition was afterwards withdrawn and superseded by his written stipulation), merely claimed that his senior and *foreign* counsel would not be able to "start to prepare the brief prior to October 20th." When he later sought to set aside that stipulation, and on November 8, 1916, he expressly stated "that said brief is *under preparation*, but is not *wholly* prepared." The affidavit stated, and this merely on information and belief, "that his senior counsel, James Manahan, would be away from his office and otherwise engaged until the week of November 5th, and would be unable to prepare any brief in said cause." This court, however, again postponed the hearing until November 20th, and both it and counsel for respondents waived the necessity of printing the briefs. Surely this was all that any self-respecting lawyer could or should ask, and surely abundant time was given for preparation!

The motion to set aside the stipulation, indeed, bore much of the appearance of trifling with the court.

The motion was prepared not by the local attorney, and sole attorney of record, C. B. Davis, but by the senior counsel, James Manahan, him-

self, and it was mailed to this court, not from St. Paul, where the latter resides, but from Minot, North Dakota. The letter accompanying it was written on the letter head of the plaintiff, Grant S. Youmans, and the name of James Manahan was signed with a typewriter thereto. The affidavit of the local counsel, C. B. Davis (and the only affidavit therein contained), was evidently prepared by the said Manahan in St. Paul and was forwarded to the plaintiff, Youmans, at Minot, in order that the oath and signature of C. B. Davis might be obtained, and for transmission by the said Youmans to this court; for the envelope bears in its left upper-hand corner the words, "James Manahan, Pioneer Bldg., St. Paul, Minn." A telegram was also sent by the said Manahan to one of the judges of this court, which confirms this belief. Yet there is no affidavit except that of the said C. B. Davis, and as to the material facts he merely states that "he believes," "or is informed."

The only ground for setting aside the solemn stipulation of October 7, 1916, and which set the case for hearing on November 10, 1916, was the alleged lack of authority of the only attorney of record, and only resident attorney, and only attorney in the case who is, except by courtesy, allowed to appear in this court, and of the alleged engagements and inability to prepare the brief of the said Manahan. Yet Davis merely swore that "he believes he exceeded his authority," and "was informed" that Manahan was engaged, etc.

Some persons must have personally known whether Davis had this authority or whether he had not. These persons were the plaintiff, Youmans, and his nonresident counsel, James Manahan. Yet they make no affidavits. Manahan must have positively known whether he had been or was engaged or not. Yet no affidavit is forthcoming from him. On the question of authority also no facts are given in the affidavit of Davis. He merely says that he "believes" he did not possess it, and when the motion comes up for argument, neither he nor Manahan nor Youmans appear, and no opportunity is given to ask questions and to elicit the truth.

We cannot allow lawsuits to be played with in this way. Nor can we allow litigants to abuse the privilege (and it is after all merely a privilege) of employing nonresident counsel to appear in our courts. Nor can we allow solemn stipulations to be set aside on mere conjecture and

alleged information when positive affidavits can be obtained from the parties who know the facts.

We set forth the affidavit of C. B. Davis, so that the situation may be clear to all. It is as follows:

State of North Dakota }
County of Ward } ss.

C. B. Davis, being first duly sworn, says that he is the identical person who signed the stipulation on the above-entitled cause, consenting to the hearing of said cause by the court on November 10, 1916. That affiant believes that he exceeded his authority in signing said stipulation, and affiant further says that said stipulation was signed under a misapprehension of the facts. That affiant, after the signing of said stipulation, was informed that James Manahan, his associate counsel who was to prepare the brief in said cause, was under contract entered into before any order to show cause had been entered in said case, to do certain work which would take him away from his office all of the time, practically, until the week of November 5, 1916, and would be unable to prepare any brief in said cause, and did not and has not prepared such brief. That no order setting said cause for November 10th has been served on affiant, or on affiant's associate counsel, or on the appellant herein to the best of affiant's knowledge, information, and belief. That counsel Arthur Le Sueur is and for some days past has been engaged in the trial of a murder case in the state of Minnesota, and, as affiant has just been informed, will be unable to be present at said hearing. That affiant's employment in said case does not extend to the writing of the brief in said action, as the same was to be written by his associate counsel Manahan. That the appellant will be irreparably injured if he is compelled to go to the hearing of said cause before the court at this time, and that said brief is under preparation, but is not wholly prepared, and that appellant is wholly unprepared at this time to argue said cause to the court, by reason of the facts aforesaid.

Wherefore, the appellant prays: First, that he be relieved from the stipulation of said C. B. Davis; and, second, that said cause be replaced in its regular place on the December calendar of said supreme court,

or that the hearing thereof be continued until the 20th day of December, 1916.

(Signed) C. B. Davis

Subscribed and sworn to before me this 8th day of November, 1916.

(Signed) Jessie F. Shipton

Notary Public, State of N. Dak.

My commission expires Sep. 17, 1920.

This opinion, as so far written, practically disposes of the case, as the brief of the appellant raises and argues no other point.

The questions involved, however, are of so great public importance that we feel it our duty to, as briefly as possible, pass upon them. The record, however, is so voluminous that some pages must be devoted to the effort.

The complaint charges a consummated conspiracy to drive the plaintiff out of the banking business, and to compel him to sell his stock and interest in the Savings Deposit Bank of Minot and to mortgage his residence property to certain of the defendants for an inadequate consideration.

Both as to the conveyances and the orders of the banking board, it is a collateral attack, no attempt having been made to set them aside in the regular and legal way. In addition to this, as we will afterwards show, there is conclusive and undisputed proof of a subsequent ratification.

There are two classes of defendants: (1) The state officials, and (2) the purchasers of plaintiff's stock.

The defendants Governor L. B. Hanna, Secretary of State Thomas Hall, and Attorney General Andrew Miller, and the Chief Examiner S. G. Severtson belong to the first class. The first three mentioned are, by virtue of their respective offices, members of the state banking board, and the fourth, S. G. Severtson, was the chief examiner of banks employed by that board, and also was the secretary of it. Though an employee intrusted with responsible duties, the statute (Comp. Laws 1913, § 5146) does not in any sense make him an independent public officer, but rather an agent of the banking board and subject to its directions and control.

In the second class belong the defendants Barron, Byorum, Rasmussen, Johnson, McGee, and Greenleaf.

Even if we give the fullest credence to the testimony of the plaintiff, it is clear that no case was proved against any of the defendants, and that the trial court was justified in directing the verdict for them.

The undisputed facts of the case, as disclosed by the record, are as follows: The plaintiff, Grant S. Youmans, was the owner of the controlling interest in the Savings Deposit Bank, of Minot, North Dakota, and in fact held practically all of its stock.

Several examinations were made of this bank by the defendant S. G. Severtson in his capacity of state bank examiner and by his predecessor Oliver Knudson.

As a result of such examinations the plaintiff's banking methods were condemned, directions were given to him at various times to remove objectionable paper, and on the 16th day of October, 1913, the following order was entered: "A special meeting of the state banking board was held in the executive office this 16th day of October, A. D. 1913. Members present were: Governor L. B. Hanna, Secretary of State Thomas Hall, and Attorney General Andrew Miller. The report of the examination of J. B. Schoregge made August 13th of the Savings Deposit Bank, Minot, and the report of the examination made by Mr. Schoregge and Arthur Johansson of the Savings Loan & Trust Company, Minot, September 11th, was presented to the board for its consideration. The board instructed the state examiner to make a special examination of the Savings Deposit Bank, and, if the condition of the bank showed no improvement over the report already submitted, he was further instructed to take charge of the bank pending the appointment of a receiver."

In accordance with this order the defendant Severtson proceeded to Minot and took charge of the plaintiff's bank for the purpose of commencing the usual receivership proceedings to wind up its affairs, and on account of the failure of the bank to remove from its paper some \$20,000 to \$25,000 worth of objectionable securities. There can be no question that these securities were objectionable and that the witness Severtson was justified in speaking of them as he did as "fake loans." There can, indeed, be no question, and even if we take the testimony of the plaintiff at its face value, that the state banking board was justified

and that it was its duty not only to object to these loans, but to take the action that it did.

Speaking for himself alone, for the other members of the court do not at this time think it necessary or wish to commit themselves upon the proposition, the writer of this opinion is firmly convinced that the action of the banking board in the matter before us was quasi judicial, and that immunity adheres to such judicial action, and this regardless of the motive or intent.

In the opinion of the writer, indeed, the duty is one which is owing to the public rather than to the individual, and it is the public alone which can call the officer to account. Any other rule, he believes, would seriously interfere with the conduct of government and with the provisions of the banking system of the state, the stability and integrity of which is of great public importance. See *Meehem*, Pub. Off. § 640.

No matter what the rule may be upon this subject, however, there can be no question that where the action taken by a quasijudicial tribunal is justified and right, and if such an action should have been taken, the motive which prompted it is not a subject for judicial investigation.

The general nature of the loans was in fact this: Youmans, besides being interested in the bank, was interested in the Savings Loan & Trust Company. This company had obtained mortgages on certain lands, obtaining at the same time second or commission mortgages. These first mortgages it had sold to third parties. The interest on the first mortgages had been paid either by the trust company or by the mortgagors, but not on the second or commission mortgages. These second mortgages were therefore foreclosed, the trust company purchasing at the sales. Youmans then, or the trust company, pretended to sell this land, encumbered as it was, to practically anyone that could be picked up on the streets, and to men who were mere transient farm laborers, who had no property interests that were known to either Youmans or the trust company or to the bank, or, as far as we can learn from the record, to anyone, and who had not even seen the land and at no time resided thereon, and took back notes and mortgages. The plaintiff, Youmans, then, in spite of the notes, and mortgages, took back deeds to the trust company of the property, for, as far as we can learn, practically no consideration, he himself testifying that the consideration of

one of them was \$2, or rather that there was an item of \$2 charged on the books for deeds. In spite of these facts, however, Youmans then turned the notes and mortgages over to the bank and took credit therefor, and to such an extent that the deposit and the credit of the trust company on the books of the savings bank was largely increased and beyond the amount of the securities which these notes and mortgages were supposed to replace.

The proof of these facts does not depend upon theory or conjecture, but upon the testimony of Youmans himself.

He testified in part as follows:

I was an officer of the Savings Loan & Trust Company. I had a majority of the stock. I had all but two shares of the common stock, however there were a few shares of outstanding preferred stock. I was the president of that company and managing officer. I had almost exclusive control of both institutions. The offices were in the same building. The same vaults and safes were used. My bank was a purchaser from time to time of a considerable amount of securities of the Savings Loan & Trust Company. Considerable of it was secured by real estate mortgage, the greater portion of it. In disposing of these securities I indorsed the paper over as president of the trust company. It is true that on the 30th day of October, 1912, the Savings Loan & Trust Company sold to my bank and my bank purchased from them about \$52,650 for securities approximately.

Q. It is true is it not, that these securities were so transferred, and put into the bank to enable you to remove the objectionable securities that have been mentioned by the examiner in his letter to you?

A. Yes sir, \$52,650 was credited to the Savings Loan & Trust Company on April 30th.

At the time the bank was closed in October, 1913, \$23,000 of the paper purchased from the trust company in October, 1912, remained in the bank. At the time the bank closed, its entire bills receivable were about \$66,000, I believe. \$23,000 of the amount was part of the loans bought in October, 1912.

Q. Now I will ask you to give a statement of the notes that were taken over by the bank on the 30th of October.

A. The notes were number 482. Carl Lewellen, mortgage dated October 26, 1912, due December 1, 1921, \$2,000.

Q. The next one?

A. Sold back to the company on November 13, 1912, and the cash received by the bank.

Q. Number 483?

A. Carl Lewellen, mortgage, same date, same due date, \$2,500. Number 485, Glen Hall, mortgage dated October 25, 1912, due December 1, 1921, \$750. Number 485 by the same man, same mortgage, same date, same maturity, \$1,000. Number 486, same person and mortgage, same date, same maturity, \$2,500. Number 487, same person and mortgage, same date, same maturity, \$750. Number 488, Jesse Edison, a mortgage dated October 28, 1912, due December 1, 1921, \$2,000. Number 489, the same person and mortgage, same date, same maturity, amount \$2,000. Number 490, same person and mortgage, same date, same maturity, \$1,200. Number 491, J. E. Routh, a mortgage, same date as last, same maturity, \$1,200. Number 492, same person and mortgage, same date, same maturity, \$2,500. Number 493, Alvin H. Campbell, a mortgage dated October 26, 1912, due December 21, 1921, \$2,000. Number 494, same person and mortgage, same date as last given, same maturity, \$2,000. Number 495, Ross J. Olson, a mortgage dated October 28, 1912, due December 1, 1921, \$2,000. Number 496, same person and mortgage, same date, same maturity, \$2,000. Number 497, same person and mortgage, same date, same maturity, \$750. Number 498, Jake Jacobs, a mortgage, October 26, 1912, same maturity, \$2,000. Number 499, same person and mortgage, same date, same maturity, \$2,000. Number 500, Robert B. Davis, a mortgage October 26, 1912, same maturity \$2,000. Number 501, same person and mortgage, same date, same maturity, \$2,000. Number 502, James P. McCoy, a mortgage, October 29, 1912, same maturity \$2,000. Number 503, same person and mortgage, same date, same maturity, \$2,000. Number 504, William N. Ghent, a mortgage, same date, same maturity, \$2,000. Number 505, same person and mortgage, same date, same maturity, same amount as last given. Number 506, Edward A. Gabbett, a mortgage, October 30, 1912, same maturity, \$2,500. Number 507, same person and mortgage, same date as last given, same maturity, \$2,000. Number 508, Joe Wood, a mortgage, October 29, 1912, due December 1, 1921, \$2,500. Number 509, same person and mortgage, same date, same maturity, \$2,500.

All of these mortgages that I have described were dated between the 25th day of October and the 30th day of October, 1912, inclusive. The face total amount of the mortgages which I have described is \$52,650 and that amount corresponds with the amount which appears to the credit of the Savings Loan & Trust Company.

Q. The day book of the Savings Deposit Bank of November 13, 1912, shows that loans 484, 487, 499, 485, 491, 490, 498, 497, 504, 482, were charged to the Loan & Trust Company doesn't it?

A. Yes, sir. The trust company gave a check on the bank itself for \$8,400, and turned in the trust company note guaranteed by G. S. Youmans for \$8,250, the two amounting to \$13,650 total.

Q. I call your attention to the paper just marked exhibit P-1, and ask you to state if that was the mortgage that was given to secure the note exhibit P.

A. Yes, sir.

Q. I call your attention to the mortgage just referred to, and ask you to state if it does not recite that it is free of all encumbrance.

A. That is the way the blank reads, but as a matter of fact the land was not at that time. It is true that the record I filed with his note and mortgage shows that the land was encumbered by a former mortgage of \$400.

Q. Do you know who William N. Ghent was, the maker of this mortgage?

A. Yes, sir. He bought the land from myself as agent, from the person that held the title, the Savings Loan & Trust Company, the bank or myself, the abstract will show. His business was the business of trying to make a living as a laborer. I first met him all the way from a day to thirty days before this mortgage was given. Had no prior acquaintance with him prior to that time. He owned no property anywhere that I know of.

Q. You sold him this property as an agent either for the trust company or for the bank on the same date this mortgage was given.

A. Either then or prior to that. I think the deed was given to him the same day he gave the mortgage back to the trust company. The consideration shown in the abstract and deed would be right. William H. Ghent was a young man. I think he was single, the mortgage will show. I could not tell whether I first met him at some of the stores or

in the hotel or where. Prior to the first time before the execution of the deed I had never heard of him. I do not remember who introduced us. I could not tell where it was. I do not remember how I came to meet him. He was not working just at that time. He was engaged in the business of working for a living for farmers of North Dakota. He hadn't a position just at that time that I know of. He might have and he might have told me so, but I have forgotten. I don't remember whether I ever saw him doing any work or not. I had lots of men working for myself. He might have worked for me, I don't remember.

Q. You never did any business with him before this in your life?

A. I may have. I cannot single him out. I do not recognize the man. He was quite a good sized man. He probably weighed about 180 pounds. I knew at the time where he came from. I have an affidavit of his. I took it from him at the time he executed exhibit P. I took it principally to have a record of this man, where he came from, his age, and the statement from him as to his status. My only other reason I presume, was the average way, trick of the banker to be dead sure everything was correct.

Q. It was a trick?

A. Yes, and the whole proposition was a trick. They all practise the same way.

Q. I was talking about Grant S. Youmans—you were tricky?

A. Yes, I had to be, but I was not tricky enough to keep out of the grasp of those other fellows. They were too tricky for me. I was trying to trick one of the great number making up the common people. I was using a banker's trick, or playing safe. I was trying to trick Ghent as one of the common people. They have to exploit everyone that comes in order to make any money.

Q. Isn't it a fact that you were trying to play a trick on the state banking board?

A. Not necessarily. I had no thought at all of tricking the banking board.

Q. Didn't have the state banking board or the examiner or any public officials in mind at the time?

A. I might have. I doubt very much whether I thought of the state bank examiner at the time the affidavit was drafted and executed. It

isn't a fact that my purpose in taking that affidavit was to make someone believe that it was a good faith transaction. I did not know that this Ghent transaction was fraudulent. I know that it was not. I don't know whether Ghent had ever seen that land or not. I don't know that he had not. I probably talked a month before about the land, and gave him a description. At the time of making the deal he talked of his wanting to get a piece of land so that he was able to pay for it, that he would be glad to have it as an investment. Probably no conversation about its character or quality. There must have been. There must have been a conversation about the consideration. Yes, there was. I cannot remember the conversation. It is hard to say who started the deal Ghent or I. I do not remember I could not tell to save my life whether I went after him or he went after me.

Q. Isn't it a fact right there at the same time you took a deed back from him?

A. Subsequently to the time this deal was made. It might have been a day and it might have been a week subsequent.

Q. Isn't it a fact that it was done immediately thereafter?

A. I don't remember.

Q. I draw your attention to the fact that that deed is dated the 29th day of October, and is sworn to on the same day.

A. Yes, that is a fact. It looks that way.

Q. That is the same day these other papers were executed?

A. The papers are dated the same date, but they may not have been executed—half the mortgages in Ward county are not executed on the date the deed shows date.

Q. Do you mean to tell the court and jury that you took this deed a week after this transaction?

A. I am not telling the jury that. I do not remember.

Q. I call your attention to the fact that it was acknowledged on the same day?

A. I am telling you that it is possible that the date may show the acknowledgment as the same day, but it might have been a day or a week later. You can date an acknowledgment back, but it is unsafe to date it ahead.

Q. This notary public was your secretary?

A. Yes.

Q. Isn't it a fact that you put this deed into the bank, the Savings Deposit Bank on the 30th day of October, 1912, that same time that you put the rest of these papers in there?

A. That deed was never in the bank. You bet I kept it in my pocket all the time.

Q. Then the transaction came to this, this man that you do not remember, that you do not remember where you saw him, and when and what he looks like, bought a piece of land from your trust company, and gave a mortgage back on it for \$2,000 and a note, and you took an affidavit from him, and then you took back from him a deed to yourself, and then you took that note and mortgage and put it in the savings bank, isn't that a fact?

A. A part is a fact and the other is not. When you state as to my saying I do not remember of ever seeing the man or ever knowing him, as a matter of fact I did know the man, and I saw him the day the papers were executed.

Q. Do you know where the man went after he finished the transaction?

A. Yes; went to work in the vicinity of Minot, for some farmer. I do not know who paid him, no. I saw him on several occasions after that when he came in for Sunday, three or four times. I think it is safe to say at least four times. I think on the street I stopped and talked to him. I cannot tell you whether he ever lived on the land.

Q. And at the time Ghent gave you back the deed no money changed hands?

A. Yes, sir. I do not remember how much. It might have been \$1 or 1 to \$10. Our notation tells where I paid \$2 for deeds. By that I mean I paid \$2 for executing the deed.

Q. And the deed you refer to is exhibit P-3?

A. Yes, sir, that is one of the deeds he executed to me. I think I had two transactions with that fellow of the same nature as this one.

Q. What was the other one. What is the date of the other transaction?

A. I think it was the same transaction, the same date I think. The same time, I think so. Involving another piece of land. We went through all this same procedure.

We cannot cumber this opinion by going any further into this evidence. It is sufficient to say that, according to the plaintiff's own testimony, this procedure was followed in many instances.

The plaintiff, Youmans himself, admitted that it was "just a small trick that he had learned when he was in the banker's fraternity to make land available for commercial purposes," and that the way he had to do business was "to grab everything in sight and give as little as possible."

How in the face of this record any person can question the right of the bank examiners to close the bank in question, it is difficult to see. Oliver Knudson, a previous state bank examiner, had found fault with the bank, and demanded that some \$40,000 worth of bad securities should be withdrawn and others replaced. In order to do this the plaintiff turns in some \$57,000 worth of securities which are the sweepings of his own trust company, and by that transaction increases the liability of the bank to that company to the extent of some \$90,000. Of this amount, too, some twenty or twenty-three thousand dollars worth are of the nature of the alleged Ghent loan and mortgage. The purpose of bank supervision is clearly to protect the depositors and the public, and, as we have before stated, not only was the board of bank examiners and was the defendant Severtson justified in the action that was taken, but they would have been remiss in their public duty if they had not taken it.

So, too, as we have also stated, if the orders of the board were in any way illegal or oppressive, an appeal could have been taken from their action to the courts, and this was never taken.

It is also elementary, and must be evident to all, that there can be no such thing as a conspiracy to do a lawful act in a lawful manner, and much less an act which it is one's duty to the public to perform.

It is also clear that the presumption of good faith and necessity applies to the discretionary acts of public officials such as those before us, and that where there is a remedy prescribed for the reviewing of these acts that that remedy must be resorted to before their order or judgment can be set aside.

It is also clear that such a remedy or method of review was prescribed by the legislature, and that no such relief was ever applied for or resorted to. The statute indeed provides, among other things, that "any

and all orders made by said board shall be immediately operative and remain in full force until modified, amended, or annulled by such board, *or by a court of competent jurisdiction, in an action to be commenced by the party against whom such order may have been issued.*" Comp. Laws 1913, ¶ 3, § 5146.

We are not only satisfied that there is no proof in the record which is before us of any improper motive on the part of the public officials mentioned, but that all of the above considerations and rules of law apply, and that even if there were any improper motives no cause of action was proved. We base this conclusion almost entirely upon the testimony of the plaintiff and appellant himself, and, where not upon his testimony alone, upon testimony which is uncontradicted and undisputed.

There is no question that sometime previous to the making of the order herein complained of that Severtson's predecessor and the then Chief Bank Examiner Oliver Knudson had criticized the conduct of the bank, and that questionable securities to a large amount had been ordered to be withdrawn and either cash or acceptable securities substituted therefor, and that no attempt was made to have this order set aside by any competent tribunal.

It is also clear that in order to comply with this order the plaintiff resorted to what he himself termed "a banker's trick," and obtained from the Savings Loan & Trust Company, which he himself practically owned, some \$52,650 worth of securities, which, to say the least, were of a very questionable character.

There can be no question that when Severtson visited the bank on October 18, 1913, he found that the liabilities of the bank were about \$61,903.37, and its loans and discounts about \$66,000, and that practically all of these loans and discounts made up of the questionable securities taken from the Savings Loan & Trust Company, and the notes of the plaintiff and his wife and brother.

There can be no question that at the time of the closing of the bank at least \$20,000 of these securities were absolutely undesirable and such as no bank should claim as assets, and that they merited the characterization of "fake loans" which Severtson gave to them.

Such being the case the action falls as to the official defendants.

As to the purchasers of the bank, the remaining defendants, there is

absolutely no evidence of fraud or duress, and at no time was there any effort or attempt to set aside the conveyance. The proof, on the other hand, shows a subsequent ratification. This, too, is apparent from the plaintiff's own testimony.

He testified that:

Q. Explain to the jury what took place between you and Mr. McGee and Mr. Severtson when Mr. McGee came it?

A. When Mr. McGee came in we were in the back room, he came in the side door, if I remember right, at least he walked back there and I went and introduced him to Mr. Severtson. Either one or the other admitted having met. They did not shake hands anyway and we went into the front office. They went in first.

"They did not ask me to go; they talked probably two or three minutes and then called me. I went in and Mr. Severtson said that \$20,000 was the amount. That was 2 o'clock Sunday in Mr. McGee's presence. That was the amount I was to work on. McGee said, "Don't you think I had better see Bob about it?" Severtson said he better see Roach about it. There was but very little said there, when we sat there facing my director and my attorney he says, "My God, don't tell them that I have not paid for my stock," I said, "George, I can't see where that will harm you any." "Well" he says, "I don't want them to know it," and that was about all that was said at that time. The next day, Monday afternoon, I think I was in his office about 4:15 o'clock. There was nobody there but McGee and his clerks. The conversation was, of course, about the affair. He wanted to know what I was going to do. He said, "What are you going to do about this thing?" I said, "It don't look as though I can do very much except what they tell me to do." I says, "My friends have all abandoned me, my bankers have abandoned me, and my attorneys have abandoned me, and I don't know which way to turn." He said something had to be done and mighty quick. During that conversation he threatened me with prosecution. He says, "Something has got to be done to save you from prosecution and trouble." I answered, "If there was any prosecution it would be on trumped up evidence. He referred to something that had been said about a false statement to the banking department, and intimated that there had been false statements. I told him there was no such thing in existence; that

I had never made a false statement in my life to the banking board, and he said, "Probably you have not." He did not say on what particular ground any prosecution would be. It was a very short interview. A couple of days later he called me up on the telephone and told me to come right up to his office, and I went. He then told me of some local parties, possibly the Second National Bank People, who were willing to put up the money and take over the bank. He said any one of them can write a check for the whole amount, and I told him it was good news if it was true and then followed the discussion of terms. First he wanted a \$10,000 bonus, and I told him it was too much, I could not think of it. I declined the proposition and left him. I think he called me up the next morning with the proposition that they would come down and take the thing over for \$5,000, and I told him I would think it over, and any settlement made would have to be made on a basis of where they would keep their hands off the Savings Loan & Trust Company business. He had said nothing about the prosecution of that company. He did not say what could cause any prosecution, just simply made the proposition they would relieve me of prosecution, that I was subject to prosecution. I only wanted "hands-off policy" on the Savings Loan & Trust Company. He talked it over that it would be better to have a receiver for the trust company and the bank at the same time, have the whole thing cleaned up. No one else was present at that conversation. He suggested the propriety of a receiver for the bank and the trust company.

Q. At this time no threats were made?

A. Just about the threat to have a receiver appointed for all of my business. I took it as a threat.

Q. Suggestion that it ought to be done?

A. Yes.

With reference to the receiver, he said, "I think I will have Francis Murphy appointed receiver for both the bank and the trust company," and he said he had already seen him. I told him that if the trust company was let alone, there was no possibility for having a receiver appointed for that, as it was in no danger, and in very good condition, and all that was wrong in the world was about \$20,000 of loans in the bank. I don't remember that he answered me at all, and that is the summed-up facts of what happened at that conversation. I went back

to the bank that morning, I think it was about Tuesday or Wednesday that he called me up over the telephone and he said, "How about that offer?" I says, "I don't know, if I can be sure of hands-off policy I guess I had better let you have the bank;" and he said, "If you say so, I will have the bunch down there in fifteen minutes and close the deal." By "bunch" I refer to Mr. Roach, Mr. Barron, Mr. Johnson, Mr. Rasmussen, and Mr. McGee. They came and went into session in the back room of the bank, and called me in, and I had a conference there with all of them. A memoranda of the contract was made, which is here, stating the terms under which I was to turn over the whole business. Mr. McGee did the talking. He called me in, or at least somebody did into the back room. When I got there they were sitting around in a circle smoking, and he said, "Well, we might just as well come to terms." I says, "All right, I want to take down a memoranda of this transaction," and I took a piece of paper and as the terms were discussed I put them down. He says, "These men are willing to take over the bank with a \$5,000 bonus, and open it up and protect your depositors." I have that memoranda and can give the terms of the verbal contract, verbal agreement that was there made up and later embraced in a written contract. I made the memoranda myself. Mr. McGee said, "These men are willing to take over this bank and open it up and pay off the depositors if you and your wife will surrender all of your stock, and resign as an officer and director, and turn over everything besides giving them a \$5,000 bonus," and I answered, "Well, just let me know for sure how I will come out on this, now if I surrender my stock and my wife's stock and give you a mortgage on my homestead of \$5,000 I will expect to have the excessive loans canceled, charged off, and delivered to me," and that was agreed to. Then within five minutes afterwards Barron backed up on that. He didn't say anything to me, he went over in the corner with Mr. McGee and they had a whispered conversation and came back and McGee says, "I don't know whether we want to give up these mortgages or not," but I had it jotted down and it stood in my mind as one of the features. McGee said, "I don't know whether that will be done or not." I said, "I will expect that to be done," and I did. He said, "The twelve farms will have to be deeded over to the bank on which the excessive loans are," and I agreed to that, and when the notes were made and the thing was agreed

to, and we all understood the terms, then McGee called me aside and he says: "You will have to come across with that \$1,000 note of mine." I told him that while it was another hold-up I will have to do it if I can be sure of hands-off policy towards my company, and he said, "All right, will you give me that note?" and I said, "I will give it to you when this bank is opened up and my depositors paid off." That was right at the same session, and the other boys were sitting there, and McGee and I at one side talking in a low whisper. I think perhaps Mr. Schoregge was there also, but I doubt it. So, we went back and took our seats, and McGee asked each one present if the terms were agreed to and satisfactory, and they all answered "yes," and he said to me, "I will go right down to my office and draw up a contract covering these items and terms, and I will have you come down and sign it." That was about 4:30 in the afternoon when the meeting broke up. About 9 o'clock in the evening McGee called me up and said the contracts were ready. It was possibly Wednesday or Thursday, I don't remember. I have the original contract which was later signed. It was drawn on October 22d. It would be Tuesday or Wednesday. That night he called me up at about 9 o'clock and I went down to his office and found Mr. McGee, Mr. Rasmussen, and Mr. Barron in McGee's office, and one or two of the clerks in the front office. He handed me a typewritten paper and he says, "There is the contract, read it over," and I said, "Well, George, this is not the contract we made." I didn't sign it, I handed it back to him, and he right promptly, without any discussion, called in his clerk and dictated a new contract and made it conform a little more to the original agreement. I took the contract and left them and went over it. I was absent about an hour thinking about it and looking it over, and when I returned I told him it was not the contract that had been agreed upon, and McGee dictated a new contract. That contract was executed at that time. McGee went along with me up to my home. We went out and had the contract signed by my wife. After it was signed by her he took the contract away and I stayed home. Whatever was said by any of those parties was said before the contract was signed. No statement was made to James Johnson. He was not present. Mr. Rasmussen talked over the bank and its business, and what the assets amounted to, and about the farms, and whether he could have all the clerks and all of the furniture in the bank and everything

in sight. I think it was the next day when the transfer of my stock was turned over and we were in the back room of the bank. McGee was there and James Johnson was there and Rasmussen and Barron, Mr. Roach, and myself. The stock had not been delivered at that time. It was probably about the same time that I turned the stock over in trust in Mr. Schoregge's hands to be delivered to them whenever they did certain things. I don't know whether he turned over the stock or not. I had turned it over to Mr. Schoregge in a conditional way. The time when I met these defendants, including McGee at the bank, or when these shares of stock were turned over to Mr. Schoregge, when I was admitted to the back room, McGee asked me this: "We just wanted you in," he said, "to see if everything was on the square," and I made the statement, "Gentlemen, you ought to be pleased with the deal you have pulled off, you have gotten a bank that has doubled its deposits in sixty days, and you have pulled over a very profitable deal for this. You have caused me to lose \$25,000 on this deal," and I got out. I think Mr. Schoregge was in the same room. Mr. Severtson had left for Bismarck.

Q. After that time you had nothing more to do with the bank?

A. No, sir, except to help them in every way I could. I got my stuff out of the bank, which they ordered me to do immediately, that is, remove the assets of the trust company and some few pieces of furniture they let me remove. All the assets of the Savings Loan & Trust Company were in the bank at that time.

The record also shows that the plaintiff himself, while negotiating with one Porter for the purchase of the bank, or for other assistance, placed the assets of the bank, excluding the questionable securities, at the sum of \$44,165 and the liabilities at \$44,000. The transaction was simply this: In consideration for a note and mortgage from Youmans to them for \$5,000 they agreed to take this bank off his hands, whose assets and liabilities were even or practically even in amount, but whose reputation and credit had been besmirched by the conduct of plaintiff himself, and to relieve the plaintiff of all other liability in the matter.

It is a general rule of law that whatever one man may do, all men may do, and what all men may do singly, they may do in concert, and, if the

sole purpose of a combination is to advance the proper interests of its members the fact of the combination does not of itself make an otherwise lawful act unlawful. 2 Mod. Am. Law, 425. (This rule is subject to exceptions, as where concerted action, such as hissing at a theater, makes a nuisance of that which, if done by one alone, would be harmless.)

Calling a transaction a conspiracy does not make it such, nor do mere epithets in a pleading constitute evidence. *Root v. Rose*, 6 N. D. 575, 72 N. W. 1022.

Damages, too, are at the basis of and are the gist of the action, and where no damages are proved no cause of recovery exists. *Martens v. Reilly*, 109 Wis. 464, 84 N. W. 840; *Commercial Union Assur. Co. v. Shoemaker*, 63 Neb. 173, 88 N. W. 156.

There is absolutely no proof of fraud or duress in obtaining the execution of the contract, nor is there any evidence of an unlawful conspiracy on the part of these purchasers. The matter of the purchase was gone over on several different occasions between the plaintiff and the purchasers, and the contract was twice changed at the plaintiff's suggestion, and in fact, new contracts were drawn. Plaintiff's own testimony clearly shows that not only was the contract involved freely entered into and based upon adequate consideration, but that he subsequently, with full knowledge, fully and completely ratified the transaction. Even if errors were committed in the execution of testimony (and on this we express no opinion, as plaintiff has wholly failed to call any such error to our attention, and, as already stated, not a single assignment of error has been argued on the merits), still the plaintiff's own testimony demonstrates beyond question that there was no merit in his case, and that it was the duty of the district judge to direct the verdict which he did.

The judgment of the District Court is affirmed.

On Motion to Vacate Order Denying Rehearing (March 15, 1917).

Denied.

COLE, J., District Judge. By an opinion of this court filed December 2, 1916, ante, 479, 160 N. W. 705, this court affirmed the judgment

35 N. D.—33.

of the trial court. A petition for rehearing was filed on December 22, 1916, and on December 28, 1916, an order was entered denying a rehearing. The remittitur was thereupon transmitted to, and judgment entered thereon in, the district court. On January 2, 1917, the plaintiff filed a motion to vacate the order denying a rehearing. Such motion is based on the following grounds: "That Judges Fisk, Burke, and Goss participated in the deliberations of the court and in the decision denying the application, and were not judges of this court at said time, their term of office having expired upon the first Monday in December of the year 1916, and the said three persons constituting a majority of those assuming to act as the supreme court of this state, and being without legal right or authority to so act, the order denying the said motion was without authority of law and void.

"That the said order amounts in effect to a complete denial of justice in the above-entitled action, no fair hearing upon the merits having ever been allowed in this action in this court."

On the 5th day of January, 1917, this court made the following order:

"Ordered, Further, that the said motion of the said Arthur LeSueur and all matters pertaining thereto to be heard before the supreme court of this state at the Capitol on Tuesday, January 16th, at 10 o'clock A. M."

On the 16th day of January the court assembled, with four judges present, and upon request of counsel for plaintiff and appellant the court adjourned to January 17th, 1917, at 10 o'clock A. M., at which time five judges were present: District Judges J. M. Hanley and A. T. Cole sitting by request in the place of Judges Birdzell and Grace, who regarded themselves as disqualified.

On said 17th day of January, 1917, arguments on the part of counsel for plaintiff and appellant and counsel for defendants and respondents were heard.

The first reason assigned for asking that the order denying the application of the appellant for a rehearing should be set aside and vacated, and the rehearing granted, is that Judges Fisk, Burke, and Goss participated in the deliberations of the court and in the decision denying the application, and were not judges of this court at said time, their term of office having expired on the first Monday in December of the year 1916, and that they had no legal right or authority to act, and there-

fore the order denying said motion for a rehearing was without authority of law and void.

The reason thus presented for a vacation of the order denying a rehearing presents the identical question which was considered and determined by this court in *State ex rel. Linde v. Robinson*, ante, 410, 417, 160 N. W. 512, 514. The plaintiff contends, however, that the opinion in *State ex rel. Linde v. Robinson*, ante, 410, 160 N. W. 514, is of no force or effect, and does not constitute an opinion of this court for the reason that it was promulgated by four district judges purporting to sit and act as judges of the supreme court, and it is contended that the supreme court cannot be constituted wholly of district judges. This question was considered in the opinions above referred to, and a contrary conclusion announced therein. We have again reviewed this question, however, and the court as now constituted are of the opinion that a district judge when called to sit in a cause pending in the supreme court becomes for all purposes of that cause a judge of the supreme court, and as such is invested with the same power and impressed with the same duties and obligations as those possessed by and imposed upon a person regularly elected a judge of the supreme court. And in our opinion the people have in § 100 of the Constitution designated the persons from whom justices of the supreme court may be chosen to take the place or places of any or all of the justices of the supreme court in any cause wherein any or all of such justices may be disqualified. The section of the Constitution referred to must have a reasonable and effective interpretation, and therefore if it should so happen, as it may happen, that for some reason all of the justices of the supreme court shall feel themselves disqualified to sit in any particular cause, a full number of judges of the district court may be called in, who, for the purposes of the cause in which they are sitting, are clothed with the full power of the regularly elected and sitting justices.

It is also suggested that the opinion in *State ex rel. Linde v. Robinson*, ante, 410, 160 N. W. 512, wherein Justices Bruce and Christianson participated, is inconsistent with the opinion in the same cause promulgated by the four district judges sitting as justices of this court, and published in ante, 417, 160 N. W. 514, for the reason that the former opinion held "that Justices Bruce and Christianson ought to be relieved from participating in the hearing of the merits of the controversy unless the contend-

ing parties insisted upon their participation," while the subsequent opinion, published in ante, 417, 160 N. W. 514, shows that objection was made to the jurisdiction of the court as then constituted. It is therefore contended that Justices Bruce and Christianson ought to have participated in the latter decision. We have carefully examined the record and find that this contention is wholly untenable. It is true, the justices elect filed written objections to the jurisdiction of the court, but such objection in no manner either suggested or requested that Justices Bruce and Christianson participate in the determination of the controversy. On the contrary, it was specifically asserted in the written objections so filed that "Justices Bruce and Christianson are equally interested in the outcome because it affects their term of office."

The position assumed by counsel for the justices elect was: (1) That all the members of the supreme court had a sufficient interest in the controversy then pending to disqualify them from participating. (2) That the supreme court of this state cannot consist solely of district judges called in to sit in places of disqualified justices of the supreme court, but that one or more of the regularly elected justices of the supreme court must necessarily participate in the decision of each cause. If this contention was carried to its logical conclusion, it would follow that in any cause in which the justices of the supreme court were disqualified one or more of such justices must sit as a judge in his own cause, or else justice be defeated because no tribunal existed to settle the controversy. Such construction of § 100 of the Constitution would tend to defeat the obvious purpose of its enactment, and convict its framers of having intended to negative, and in certain cases destroy, the very object they sought to promote.

And while we are not directly concerned with the decision in *State ex rel. Linde v. Robinson*, ante, 417, 160 N. W. 514, and find it unnecessary to express either our approval or disapproval of the principles of law therein announced, we are all agreed that that decision, promulgated by four district judges sitting as judges of the supreme court, is in fact the opinion of the supreme court of North Dakota, and entitled to the same consideration as though it had been promulgated by four regularly elected justices of the supreme court.

The question whether the terms of office of Judges Fisk, Burke, and Goss expired on the first Monday in December, 1916, or the first

Monday in January, 1917, is not involved in the instant case, however. The question is whether they were in fact either *de jure* or *de facto* judges. And we are all agreed that they were in any event officers *de facto*.

The authorities generally recognize that the three essential requisites of an officer *de facto* are:

1. The office held by him must have a *de jure* existence, or at least one recognized by law.

2. He must be in the actual possession thereof; and,

3. His holding must be under color of title or authority. *Constantineau, De Facto Doctrine*, §§ 26 et seq; 29 Cyc. 1389 et seq.

In the case at bar the existence of the *de jure* office is conceded. Consequently, Fisk, Burke, and Goss were *de facto* judges provided:

1. They were in possession of the office.

2. Were holding over under color of title or of authority.

There can be no question whatever about the first proposition. They were concededly in possession of their respective offices, and were at no time dispossessed. They were recognized as incumbents of such offices by the clerk, marshal, and reporter of the supreme court, as well as by Justices Bruce and Christianson, the two hold-over judges whose membership in the court was not in dispute. They occupied the official chambers set aside for justices of the supreme court and formerly occupied by them in the state capitol. They were also recognized by the various executive officers as incumbents of the offices. For instance, Chief Justice Fisk was recognized by the board of pardons; the state auditor and state treasurer, respectively, recognized their incumbency, and warrants for their salaries were drawn by the state auditor, and paid by the state treasurer. They were also recognized by the various litigants and attorneys having business in the supreme court of the state of North Dakota and the various public officers required to transact business with the court. The record fails to show a single case wherein their authority to act during the month of December was questioned by any litigant or attorney. In fact the attorneys for the plaintiff in this case in the petition for rehearing made no objection to the disposition thereof or consideration of the same by the court as then constituted.

There is no question of the original authority or legal warrant of Justices Fisk, Burke, and Goss to occupy their respective offices. They

received their authority directly from the people, and in accordance with a practical construction of the Constitution, concurred in by every member of the court for a quarter of a century, and in which they concurred, when they assumed their respective offices, they claimed the right to exercise the duties of their respective offices during the month of December. They were never ousted from possession, but continually remained in possession of, and were apparently and to all intents and purposes in full possession of, their offices, and continued to exercise the duties thereof. In addition to this, the decision in *State ex rel. Linde v. Robinson*, ante, 417, 160 N. W. 514, filed December 11, 1916, held that Justices Fisk, Burke, and Goss were in fact *de jure* officers, and entitled to hold and occupy their respective offices as a matter of right.

If it be assumed that Fisk, Burke, and Goss were not *de jure* judges, it still seems manifest that they were *de facto* judges. In fact it is hard to conceive of a case more clearly within the *de facto* doctrine. And the fact that the acts of officers, *de facto*, and not *de jure*, are binding, is well settled by a uniform line of decisions, unbroken practically by adverse decisions, where the officers are *de jure*, and this has been held in many instances where the office or offices themselves were not in fact *de jure*.

In this connection it will be well to note a few of the leading decisions, among which is the case of *Lang v. Bayonne*, 15 L.R.A.(N.S.) at page 93, and numerous cases therein cited. In our own state the matter has been up for decision and decided by our own court in the case of the *State ex rel. Bookmeier v. Ely*, 16 N. D. 569, 14 L.R.A.(N.S.) 638, 13 N. W. 711, and also in the case of the *State v. Bednar*, 18 N. D. 484, 121 N. W. 614, 20 Ann. Cas. 458. In the first mentioned case the following language is used: "The books are full of cases attempting to define a *de facto* officer; but it is generally conceded that no precise definition can be given fitting all cases, and that each case must be determined largely upon its own facts. We have carefully examined a great number of authorities on this subject, and, as to the reason for courts holding officers illegally in possession of an office officers *de facto*, and their acts valid, find that the statement of this doctrine most generally accepted is contained in *Plymouth v. Painter*, 17 Conn. 585, 44 Am. Dec. 574, where the court says: 'The principle established in these

cases in regard to the proceedings of officers *de facto*, acting under color of title, is one founded in policy and convenience, is most salutary in its operation, and is, indeed, necessary for the protection of the rights of individuals and the security of the public peace. The rights of no person claiming title or interest under or through the proceedings of an officer having an apparent authority to act would be safe if he were obliged to examine the legality of the title of such officer up to its original source, and the title or interest of such person were held to be invalidated by any accidental defect or failure in the appointment, election, or qualification of such officer, or in the rights of those from whom his election or appointment emanated. Nor could the supremacy of the laws be maintained, or their execution enforced, if the acts of the officers having a colorable, but not legal, title, were to be deemed invalid.' "

This case also cites the case of the State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409, and the case of People ex rel. Norfleet v. Staton, 73 N. C. 546, 21 Am. Rep. 479.

In Brown v. O'Connell, 36 Conn. 432, 4 Am. Rep. 89, it is held that an officer in possession of an office, although appointed by a body without authority to make the appointment, is an officer *de facto*.

The case of Brady v. Howe, 50 Miss. 607, holds that a person appointed to the office of judge, although the governor had no legal authority to make the appointment, for the reason that the office was filled by one whom the governor had no power to remove, was nevertheless an officer *de facto*.

In the case of the State v. Bloom, 17 Wis. 521, it was held that if a person is convicted and sentenced at a term of court held by a person exercising the office of judge of such court under appointment of the governor, and without authority of law, there being no person entitled to exercise such office, the sentence is nevertheless valid and binding as against collateral attack by habeas corpus.

In McCraw v. Williams, 33 Gratt. 510, a person elected as judge and commissioned as such entered upon the duties of the office in the belief that his term commenced immediately, and he was held to be a *de facto* officer, notwithstanding that his term did not legally commence until a considerable later date, and his predecessor's term had not expired.

In the case of *Ex parte State ex rel. Atty. Gen.* 142 Ala. 87, 110 Am. St. Rep. 20, 38 So. 835, the court passed upon the matter of the state of Alabama having created a judicial circuit and the office of judge thereof by an unconstitutional and void statute, but independently of the statute there was in a certain county a circuit for that county and a circuit judge. The judge commissioned by the governor under the void statute attempted to exercise the duties of the office of circuit judge of the county in question, and it was held that he was an officer *de facto*, and his acts valid.

In the case of *Cleveland v. McCanna*, 7 N. D. 455, 41 L.R.A. 852, 66 Am. St. Rep. 670, 75 N. W. 908, it was held that "it is well settled that the validity of the acts of a *de facto* officer cannot be attacked in a collateral proceeding."

In the case of the *State v. Bednar*, heretofore cited, the previous decision in the case of the *State v. Ely*, heretofore cited, was affirmed, and in it the court quotes from the case of *Coyle v. Com.* 104 Pa. 117, 4 Am. Crim. Rep. 379, and among other language the following: "A judge *de facto* assumes the exercise of a part of the prerogative of sovereignty, and the legality of that assumption is open to the attack by the sovereign power alone. If the question may be raised by one private suitor, it may be raised by all, and the administration of justice would, under such circumstances, prove a failure. It is not denied that Judge McLean was a judge *de facto*, and, if so, he is a judge *de jure* as to all parties except the commonwealth."

In the case of *Cole v. Black River Falls*, 57 Wis. 110, 14 N. W. 906, the following language is used: "If the offices exist *de jure*, then it is the settled doctrine of this court, as well as of other courts, that all persons who are in the exercise of the duties of such offices by color of law are officers *de facto*, and their acts are valid. And the fact that they are in by color of a law which is unconstitutional and void, does not make an exception to the rule."

No law ever contemplated an interregnum or hiatus in office. Every government instituted and its several subdivisions in this country have been instituted and are maintained upon the idea that the working form or forms of such government or governments, the different instrumentalities making up the executive and judicial branches, shall continue to operate without there being any measure of time when such executive

or judicial branch has no working power and no official acting for it. This purpose in governments like ours is that all changes, if changes are made, shall be made peacefully and without revolution, and to assure this there must at all times exist within the executive and judicial branches of the government a working power, sometimes it may be without being *de jure* in fact, but, nevertheless *de facto*, exercising *de jure* powers for the time being, and which the people are bound to respect, and the acts of which are binding upon the constituent members of each particular branch or subdivision of government.

Were it otherwise our country would be subjected to the uncertainties of complete change, and revolutions so characteristic in the past of many of our Central and South American governments and even our neighboring nation to the south, unfortunate Mexico.

In the case of *Ball v. United States*, 140 U. S. 118, 35 L. ed. 377, 11 Sup. Ct. Rep. 761, the opinion being delivered by Chief Justice Fuller, the following language is used: "We are of the opinion that the irregularities alleged did not place Judge Boorman, in holding the October term, in any other position than that of a judge *de jure*, and that as to the April term he was judge *de facto*, if not *de jure*, and his acts as such are not open to collateral attack."

This part of the opinion is followed by numerous citations, including a number of different states.

In the case of *McDowell v. United States*, 159 U. S. 596, 40 L. ed. 271, 16 Sup. Ct. Rep. 111, the opinion being written by Justice Brewer, it is stated that "the rule is well settled that where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public."

In the case of *Byer v. Harris*, 77 N. J. L. 304, 72 Atl. 136, the following language is used: "Whether he was authorized to hold the court at the time, or at all, was of no moment in this proceeding, as he was a *de facto* magistrate, whose proceedings cannot be attacked in this way in these proceedings."

This was the case of a police magistrate, and the court holds, as seemingly all courts do, that to try the title to an office one must, through the medium of the commonwealth, secure or initiate the proceed-

ings under quo warranto, and the title never can be tried in a collateral proceeding or by collateral attack.

The question of the power of *de facto* officers to act and their acts being valid has been considered by the courts of practically every state in the Union and the binding character of the acts of *de facto* officers sustained, not only as to judicial matters, but as to nearly all classes of offices, superior or inferior, which go to make a part of national, state and municipal governments.

There must be a finality in all matters litigated in the courts of this state, as well as the courts throughout the entire United States. The supreme court is the court of last resort, and it, being the court of last resort, must finally determine and settle all matters before it. If, because it may happen that justice may not have been absolute or equal in some case or proceeding as a matter of fact, one may come into court after a final legal determination of the issue as provided by the people themselves through their Constitution and laws, and reopen any particular case and again bring it into being, then there will be no finality in any legal proceeding, no security of title, and any and every decision of a court of final resort will be in its nature but a temporary, rather than a final and absolute, determination, and no controversy could ever be said to be set at rest.

No human institution has ever been devised that could ever and always balance the scales of justice between two contending parties. Absolute justice cannot be looked for so as to evenly balance the scales at all times and in all matters between parties who are at issue as to their respective rights. If there could be an equal and exact balancing of justice and right between contending humanity, then there would be no need of courts, because there would be no controversy for courts to settle.

Many an issue that has a final determination in the court or courts of last resort may leave some doubt in humanity as to whether or not justice has been done and the scales evenly balanced in trial and appellate courts. This is but the exemplification of the imperfections of humanity, and illustrates the fact that there must be a finality and a final determination of issues, and the question of exact and equal justice cannot forever continue to keep open a controversy, and never end.

Courts have been so emphatic in insisting upon a final determination

that even so important a matter as the conviction and sentence of a man to be executed has not been permitted to be attacked collaterally, but such conviction and sentence upheld and the sentence carried out under the affirmance and direction of the supreme court, even where it may be that the trial judge might have been ousted from his office under quo warranto.

The case of the People v. Sessovich, 29 Cal. 480, is an illustration of this fact. There the defendant was convicted and sentenced to be hung, and an appeal was made to the supreme court of that state, the questions on appeal having, among other questions, a challenge as to the trial judge having a right to his office. The court in that case held that that question could not be raised in a collateral way, and affirmed the judgment. Among other language used in that case was the following: "The acts of *de facto* officers must be held valid as respects the public and rights of third persons. A contrary doctrine, for obvious reasons, would lead to most pernicious results."

In the case of the State v. Brown, 12 Minn. 538, Gil. 448, the defendant was indicted for murder in the first degree and found guilty of murder in the second degree. On appeal to the supreme court the question was attempted to be raised as to the right of the trial judge to hold his office. The right to attack in this collateral manner was denied, and among other language used in the opinion is the following: "Whether the judge's term of office had legally expired is a question that cannot be decided in this action. He was, at least, an officer *de facto*, and until his right to the office is settled by a direct proceeding for that purpose it cannot be legally questioned in a collateral proceeding."

In the case of Joseph v. Cawthorn, 74 Ala. 411, Judge Somerville used the following language: "There is no distinction in law between the official acts of an officer *de jure*, and those of an officer *de facto*. So far as the public and third persons are concerned the acts of the one have precisely the same force and effect as the acts of the other. The only difference between the two is, that the latter may be ousted from his office by a direct proceeding against him in the nature of quo warranto, and the former cannot. Their official acts are equally valid. The rule is one which is dictated alike by principles of justice and public policy. It would be a great hardship if innocent persons were made

to suffer by the unknown negligence of officials who, under color of office, were daily holding themselves out to the public as officers *de jure*." See also *Com. v. Wotton*, 201 Mass. 81, 87 N. E. 202.

In the case of the State *ex rel. Knowlton v. Williams*, 5 Wis. 308, 68 Am. Dec. 65, the following language is used: "Courts take notice of accession to office of officers under the Constitution, and while they remain in office and exercise the duties thereof, regard them as officers *de facto*. Generally, as respects third persons, the acts of an officer *de facto* are to be recognized as valid."

We have cited these last-mentioned cases in connection with the matter of the finality of proceedings in the appellate court. There must be an end to litigation, there must be a final determination of the rights of litigants, and for this purpose appellate courts are created. If, after a case has been finally determined and disposed of in the appellate court provided by the Constitution and laws of a state, it may be recalled and again reheard, there would be no end to controversies between parties or litigation, there would be no final determination as to rights or titles, and all rights, both of a personal and property nature, would at all times be insecure. If, after a final determination, a matter may be recalled because some one feels that justice has not been equally balanced, then if two parties were at issue upon the question of title to land, for illustration, when the appellate court had finally determined the title and disposed of it, such title would still be insecure and unsafe and liable to be changed and reversed on a recall of the litigation, because some one came into court claiming injustice at some point in the litigation.

It may not be improper in this connection to advert to the fact that during the year 1916, particularly, the year just passed, when the litigation in the case under consideration was had, there was tense civil contention between different elements of the people in the state upon the proposition of radically changing the governmental ideas of our commonwealth. This tense contention necessarily to a greater or less extent prevented a large number of citizens of the state from giving the calm and judicial consideration to matters involved in litigation and the interests of the people generally that would help arrive at just and reasonable conclusions, and for this reason there perhaps crept into

the case we are now considering in this opinion a feeling of rivalry where there should have been a mere matter of disputed right.

Judges Fisk, Burke, and Goss were continuing to hold their offices during the month of December as the justices of the supreme court had continued to do from statehood up to the present time. They were working under the sanction, not only of their oaths as justices of the supreme court, but the precedent established and maintained from the beginning of statehood.

This court is invested with three separate and distinct grants of jurisdiction: 1. Appellate jurisdiction. 2. Superintending jurisdiction over inferior courts. 3. Original jurisdiction in certain causes involving questions *publici juris*, and affecting the sovereignty of the state or its franchises or prerogatives or the liberties of its people. Const. §§ 86, 87.

In this case the appellate jurisdiction alone is involved. The Constitution provides that this jurisdiction be exercised under such regulations as may be prescribed by law. Const. § 109.

When an appeal is taken, the supreme court becomes invested with jurisdiction. It retains such jurisdiction until the cause is disposed of and the remittitur sent down to the court below. Can it afterwards reinvest itself with jurisdiction? We think not unless it appears that remittitur was sent down through inadvertence, mistake, or fraud. And when it appears that after decision the remittitur is sent down intentionally in accordance with the court's order properly made in the usual way, the supreme court loses all control over the cause, and cannot subsequently recall the remittitur any more than it may ask that a cause be forwarded to it for decision in which no appeal has been taken. See *State v. Sund*, 25 N. D. 59, 140 N. W. 716; *Hilemen v. Nygaard*, 31 N. D. 419, 154 N. W. 529, Ann. Cas. 1917A, 282.

This court has been appealed to from what is claimed to be the standpoint of justice. Upon argument counsel for plaintiff and appellant strenuously insisted that gross injustice had been done their client. In fact the leading counsel for the plaintiff and appellant made his principal argument upon that contention. He asks this court to now set aside and vacate the order denying a rehearing and recall the remittitur. To do so would be to lay aside for the purpose of this one cause the well-settled rules of finality of this court and upon the plea

of miscarriage of justice by one of the contending parties to wipe out the finality that is provided for every cause that comes to this court, and upon this occasion to set it aside and again open the doors to another contention and another decision which undoubtedly would, no matter whether it would sustain the former decision of this court or otherwise, still leave one party or the other feeling that gross injustice had been done.

Nearly every cause brought before this court has interpreted into the argument made by counsel for contending parties a plea alleging injustice, and usually gross injustice. Were such pleas to be the basis for the determination of this court, undoubtedly most of the litigation brought here for final determination would be long continued, uncertain, and in some cases almost never ending. Such a practice or precedent cannot be established. This being a court of final resort, when it has once acted and made a final determination of a cause and the remittitur sent down in the regular manner as in the case at bar, there would have to be very exceptional reasons, such as do not now suggest themselves, to set aside and vacate a final determination and to bring the issues back into this court.

While we do not believe that this court has any power to reinvest itself with jurisdiction for the purpose of reconsidering the merits of this cause, yet in view of the strenuous contention of plaintiff's counsel that gross injustice has been done to their client by the former decision and that an examination of the record would disclose this fact, we have examined the record at length in order to ascertain the truth with respect to every phase of the application, and we find nothing in the record or in the proceedings of the court as constituted and acting in the month of December, 1916, that would warrant us in setting aside the order denying a rehearing. The examination of the record also leads us to the conclusion that the former decision on the merits of this cause is right and should be permitted to stand, even though the court was possessed of power to reconsider the merits of the cause.

Counsel for plaintiff and appellant in his argument before this court admitted that under the press of other engagements he and his associate counsel had not given the case that attention and consideration in its preparation for the hearing in this tribunal that it should have

had, and asks that we now permit a wide latitude of sympathetic favor to be interpreted into this case.

The matter has been heretofore regularly and finally determined and disposed of. The motion to set aside and vacate the order heretofore made denying the rehearing and recalling the remittitur is denied.

HANLEY (concurring). I concur in the principles of law stated in the syllabus, and in the conclusion announced in the majority opinion.

As I understand the argument of counsel for appellant, they present two questions to the court on this application.

First, they question the right of the court as constituted on December 28th, 1916, to deny a rehearing and transmit the remittitur to the trial court, on the alleged ground that the terms of office of three members of the court as then constituted expired on the 4th day of December, 1916, and therefore the action of the court in denying the rehearing and transmitting the remittitur was a nullity.

Second, the appellant appeals to the discretion of the court as now constituted to consider the case on its merits, in passing upon the application for a rehearing, even if it is conceded that the court as constituted on December 28th, 1916, was a *de facto* court. And on this question argue, on the merits of the original controversy, that the court, in its original opinion,—*Youmans v. Hanna*, ante, 479, 160 N. W. 705,—misunderstood the question presented and argued, and that said court at that time did not give the proper consideration to the case, on the alleged grounds that it was advanced on the calendar and hurriedly heard.

As to the first question, the appellant challenges the jurisdiction of the court sitting in *State ex rel. Linde v. Robinson*, ante, 410, 160 N. W. 512, which was a proceeding in which the court as then constituted issued an order to show cause why the court should not take jurisdiction and determine the question as to when the term of office of the newly elected justices of the supreme court commenced.

I am of the opinion that the petition filed by the attorney general, and which instituted the proceeding, was insufficient in that it did not state facts sufficient to constitute a cause of action in favor of the state and against the justices elect, in this, that the said petition asked the court to exercise its original jurisdiction preventing or restraining Jus-

tices elect Robinson, Grace, and Birdzell from taking office, and, as grounds, alleged, among other things:

"That at the general election held in November, 1916, said Justices Robinson, Grace, and Birdzell received a majority of all the votes cast, and were chosen and elected as justices of the supreme court of this state, to succeed Chief Justice C. J. Fisk and Judge E. T. Burke and Judge E. B. Goss, but that as yet, at this date (the date of the filing of the petition), no official canvass of the vote had been made.

"That under the Constitution and laws of the state of North Dakota, and the custom prevailing in the state, the terms of office of the justices elect will begin on January 2nd, 1917. That the incumbent justices constitute a majority of the supreme court, and that there is at present before the supreme court a large number of cases which have been argued and submitted and undisposed of because it is generally assumed that the terms of office of their successors begin in January, 1917, and not in December, 1916.

"That there has been brought to the knowledge of the incumbent justices that the three justices elect will claim and contend that their terms of office begin in December, 1916, and that Justice elect Robinson has by letter communicated to the chief justice his contention that the term of office begins in December, and that he will then demand and exercise his right to qualify and take said office. That a letter purporting to have been signed by said Justice elect Robinson has been printed in the Bismarck Tribune and Fargo Forum, and perhaps other papers of the state, setting forth his views in the matter, and that in the Grand Forks Herald of November 28th, 1916, Justice elect Birdzell is quoted as having stated that should a fight be made, he would stick by his colleagues.

"That the said justices elect are each and all threatening to intrude into and assume the office of justices of the supreme court unless restrained from so doing. That by reason of the said matters and proceedings to be taken by the said justices elect, confusion and uncertainty exist as to who is entitled to hold the office; that the state, as plaintiff, is entitled under the Constitution and laws to have a supreme court that shall not unlawfully be hindered, impeded, or interfered with, and that the court should by its original writ prevent the usurpation of office by the justices elect and prevent their intrusion, or

attempted intrusion, into the office, and should assume jurisdiction in the matter and declare which justices are entitled to hold the office during the month of December, and determine as to who is entitled to the salary during that month, and for such other relief as the court might grant."

This petition is based upon letters of one of the justices elect and upon newspaper accounts of what might happen, and there is no allegation in the petition that any steps or acts had been taken or committed by any of the justices elect seeking to take the office by force or threats of force, and to my mind the effect of the petition was to ask the court to anticipate a possible state of facts that might arise and to try the title to the office in a summary manner, and by injunction, and was in effect a petition to try a cause of action before it actually arose.

If the facts presented in the petition were such that it was claimed that the justices elect had offered or attempted to take physical possession of the office and the books and papers, another situation would have been presented.

But as I understand the petition filed in the matter such were not the facts alleged, nor do I understand that the petitioner brought the proceedings within the facts stated in *State ex rel. Bolens v. Frear*, 148 Wis. 456, L.R.A.1915B, 569, 134 N. W. 686, cited by the court in *State ex rel. Linde v. Robinson*, *supra*.

That the petition does not state facts sufficient to state a cause of action also seems to be borne out by the fact that the court as constituted in that case, did not issue an order directed against the three justices elect as petitioned for, but issued an order to show cause against, not only the three justices elect, but the three incumbents, which directed all six of the contesting judges to appear and show cause why the court should not take jurisdiction of the matter and determine the title to the office in a summary manner.

I cannot see the distinction between this and issuing a writ or order to show cause in any case and deciding it in a summary manner where the title to office is in alleged dispute, and it seems to me that a dangerous precedent has been established in this matter.

I, as district judge, sitting on the court, concurred in the issuance of the order to show cause to all six of the justices, not on the ground that the court had a sufficient proceeding before it, but upon the ground

that in the controversy that had arisen between the contending parties a court should be offered to the contending justices in which they could settle the difficulty. *State ex rel. Linde v. Robinson*, ante, 410, 160 N. W. 512. When the justice elect filed written objections and took the position that the court had no jurisdiction in the matter, I, for the reasons stated, did not act further in the proceedings. However, the remainder of the court held that the court did have jurisdiction of the subject-matter and of the parties, and in *State ex rel. Linde v. Robinson*, ante, 417, 160 N. W. 514, held that the term of office of the judges of the supreme court commenced in January, and not in December. The reasoning of that decision, and particularly the portion of it which holds that it has been the implied construction since statehood that the term begins in January, and not in December, is difficult to follow. This is particularly so in view of the fact that at least two of the retiring judges whose terms were involved in that decision took their oath of office in December when first elected, and made formal demand for the possession of the office that month. In justice to them, however, it should be said that they made such demand in order to protect their rights in case a controversy arose, rather than to compel the possession of the office. I am requested by Judge Cole, sitting in this case, to state that he also questions the reasoning of the court as constituted in *State ex rel. Linde v. Robinson*, ante, 417, 160 N. W. 514, in which it held that the term begins in January, rather than in December. I am satisfied, however, that when the court handed down this opinion, it became the law of the case and settles the question as to the time of commencement of the terms of office of judge of the supreme court in this state.

That decision of the court was acquiesced in, and during the month of December, 1916, the three retiring judges continued to sit on the court and transact its business, and during that time constituted the only supreme court of the state that transacted business. The old court was recognized as the supreme court during that month, and certainly was at least a *de facto* court during the time when the petition for rehearing in the instant case was denied, and the supreme court of this state having heard and decided on the merits the instant case prior to the first Monday in December, 1916, when its right to act was unquestioned, and having denied a rehearing in the matter on December 28th,

1916, when it was the only acting supreme court of the state, and at least a *de facto* court, and having at said time intentionally transmitted the remittitur to the lower court, I am satisfied that, under the law and the decisions, the case is ended, and for the reasons expressed in the majority opinion, this court cannot now and again consider a petition for rehearing.

In determining the question as to whether or not the remittitur which finally terminated the instant case was properly sent down or transmitted to the lower court, each one of the court as now constituted has gone through the record from its inception, and in view of the fact that the counsel have argued so strenuously that an injustice was done on the merits of this case, it may be proper to make a statement of what the facts in the case are.

I am satisfied that the record shows that the original opinion of the court on the merits was correct, and certainly such opinion shows that the court went carefully into the whole record, even though it is argued that the case was hurried to a decision.

The testimony of the plaintiff, Youmans, discloses that he and his wife held the great majority of the stock of the bank involved in this action, and that he also owned a great majority of the stock of the Savings & Trust Company operated by him in the same building. That in the assets of the bank was a large amount of paper which was not bankable, and objection being made to this paper by the bank examiner and banking board of a previous state administration, he in the space of one or two days collected a number of strangers in Minot, and by arrangement with them, and for no adequate consideration, conveyed to these different strangers a number of quarter sections of farm land already mortgaged, belonging to him or to the loan company, and took back from these strangers notes and mortgages on the land, and then had the strangers redeed the land to him or his loan company, which deeds he kept in his possession unrecorded. He then took these notes and mortgages to the amount of over \$50,000 and put them in the bank as assets, and the credit therefrom was used by him or his loan company. The effect of the transaction was the placing of mere paper assets in the bank to that extent, and which added not a dollar to the market value of the assets of the bank or himself or the loan company. The effect of the transaction was a loan by the bank

to himself or his loan company of over \$50,000, and this, in direct conflict with § 5172 of the Compiled Laws 1913, which limits the liability of any one person or corporation to a bank at 15 per cent of the capital and surplus stock of such bank.

The plaintiff admits these transactions, but claims it was a "banker's trick" and that "they all do it."

The transaction was not only "high financing," but under the provisions of the Code, § 5173 of the Compiled Laws 1913, enacted for the protection of depositors in banks, was an offense for which the plaintiff could have been prosecuted in court.

These mortgages also represented on their face that they were first mortgages, when as a matter of fact there were other and outstanding prior mortgages on the different tracts of land to the full loan value thereof, and, if these second mortgages were represented as first mortgages, and if exhibited to the bank examiner with intent to deceive, that act would be a criminal offense under the laws of this state (Comp. Laws 1913, § 5174).

In disregard of many orders of the banking board a large amount of this paper remained in the bank at the time it was closed by the bank examiner. Under the laws of this state a bank under such conditions is deemed insolvent (Comp. Laws 1913, § 5189), and under such conditions the banking board has authority to close the bank, and it becomes the duty of the banking board to forthwith take possession of any bank becoming insolvent, or which violates the provisions of the Banking Laws (Comp. Laws § 5183).

The banking laws of this state provide that no bank shall carry among its assets at any one time loans dependent wholly upon real estate security in any amount exceeding 25 per cent of the total loans and discounts, and then only upon first mortgages, which shall not exceed 40 per cent of the actual cash value of the property mortgaged. Comp. Laws 1913 § 5150, ¶ 8. The record in this case discloses that at the time the bank was closed more than one half of the assets of the bank consisted of loans dependent wholly upon real estate, which was in violation of the provisions of the law which has for its purpose the conservation of the assets of a bank for the protection of its depositors.

Under these facts the bank examiner closed the bank, and there was

no contention at that time by the plaintiff that the bank was solvent under the law; but he claims that the bank examiner demanded that he deposit more cash in the banks as assets than was necessary to make the bank solvent, and that the bank was taken away from him as a result of a conspiracy by the defendants to deprive him of his property. If at the time the plaintiff believed that the amount demanded was too much, he had his recourse in the courts by an action for a restraining order to prevent such demand, and in that proceeding the exact amount required to make the bank solvent could be determined. Instead of doing this he negotiated for the sale and disposal of the bank, and sold the same to the defendants, Barron, Byorum, Johnson, and Rasmussen, who are not connected with the banking board, on condition that they should make the bank solvent and protect the depositors, and relieve the plaintiff of all liability in the matter. This the defendants mentioned agreed to do on the transfer of the bank to them, and the giving to them of a note and mortgage in the sum of \$5,000 by the plaintiff, which was the amount of the plaintiff's individual indebtedness to the bank.

The transfer papers in this transaction were made by the plaintiff himself. No action has been started by him to set the transfer aside, and his offer of proof discloses that if he had desired to he could have opened the bank and not transferred it, as he was offered sufficient funds by his friends, to place in the bank as assets to the amount required by the examiner and the banking board. Nor was the transfer without consideration to the plaintiff, as by its terms he relieved himself of the liability fixed by statute (§ 5168, of the Compiled Laws), under which his property in the loan company, and other property, would have been liable for the debts of the bank.

Counsel complain of the manner in which the bank examiner took possession of the bank and its assets, claiming that he arbitrarily excluded the plaintiff from access to the bank.

Under the law the bank examiner has the authority, and it is his duty, under the direction of the banking board to "forthwith take charge of an insolvent bank." Comp. Laws 1913, § 5183. And the object of this statute is undoubtedly to place the assets of an insolvent bank completely in the hands of a bonded officer of the state, to the exclusion of all persons, even the officers of the bank, to the end that

the assets remain intact. It is true that the statute contemplates that the assets be held pending action in court and the appointment of a receiver, but such action became unnecessary, as the plaintiff, as before stated, transferred the bank to purchasers who, under the banking laws, deposited assets enough to make the bank solvent and agreed to protect the depositors and relieve the plaintiff of further liability.

The errors complained of in the trial court are largely alleged errors in receiving or rejecting evidence.

In my opinion such errors, if any, are nonprejudicial, and could not affect the final decision in the case, for the reason that, under the plaintiff's own testimony, he failed to show a cause of action, and established the fact that, under the facts testified to by him, it would be impossible to recover on the theory that a conspiracy existed under which the bank was closed and taken from him.

The trial court was right in directing a verdict for the defendants.

The petition of the appellant for a rehearing in this matter should be denied.

ROBINSON, J. (dissenting). In the Grant Youmans Case a motion to reconsider and grant a new trial is denied, and I do most strenuously dissent. The decision is a lengthy write-up by two judges of an inferior court, and is contrary to the deliberate judgment of a majority of our justices. Hence, it is not the judgment of this court, but while it stands it will stand as a reproach to this court. Hence, it will still be the duty of this court, on its own motion, or on any proper motion, to reconsider the case and to order a new trial.

The case is a travesty on the administration of justice. It is a regular Captain Dreyfus Case. The record covers over nine hundred pages, and there is error on every page. The defendants have, as it were, moved Heaven and earth to prevent a fair trial, or any trial, and that alone shows they have reason to fear the result of a fair trial.

At Minot the plaintiff was a banker. He and his wife practically owned and controlled a bank of large resources, though of questionable solvency, a bank out of which it seems the looters made big money. The bank examiner, with others of the defendants, came upon the plaintiff and forcefully closed the bank, taking all its property and the property of the plaintiff and his wife, and a bonus of \$5,000.

Youmans testifies:

The bank examiner came to me with a bunch of papers in his hand. He placed me in a chair and told me to sit down there. He took hold of the chair and, said, "*Sit down there.*"

Q. Did you?

A. Yes, sir.

The bank examiner objected to certain mortgages, amounting to \$20,000, and gave Youmans a day to replace the loans with cash. This Youmans prepared to do. Then the examiner put up the figure to \$48,000. Youmans said: "My God! You don't mean that." The answer was: "That is the amount you will have to put up to save the bank." "Then I sat down into a chair and became partly unconscious. It put me to sleep practically." The whole procedure was of that same bulldozing character. The examiner and his bunch forced Youmans to turn over to them the bank and all its books and his stock in the bank, with a bonus of \$5,000. This was done by duress and threats, and by taking an unfair advantage of another's necessities and distress, contrary to the plain words of the statute. This bulldozing procedure had no authority in law. It matters not whether Youmans was a good man or a bad man, or whether his bank was solvent or insolvent; there was no law to warrant the procedure. In taking charge of the bank the examiner was acting under a statutory power, and he was bound to keep strictly within the limits of his power and to use it humanely, and not oppressively. *This he did not do.*

The record is a mass of error. It shows that from the beginning to the end of the case the rulings of the trial court were in the main decidedly against the plaintiff. Five hundred times the court ruled erroneously to strike out testimony of the plaintiff as not responsive or as a voluntary statement, just as though the witness were not sworn to tell the whole truth, and not merely to answer such questions as counsel might put to him. Youmans testifies: "The whole bunch, the examiner and others, refused to let me have the assets of the bank or a list of them. They absolutely refused to let me have access to the stuff. They had gobbled it and they never let me put my hands or my eyes on it after that." (Purcell): "I move to strike out the answer as not responsive and as a voluntary statement and absolutely false." "The

word false is withdrawn and the answer stricken out." And so the trial continued for ten days, with error upon error, making a record of over nine hundred pages. The trial should have been concluded in two days, with a record of not more than two hundred pages. The testimony should have been limited to the condition of the bank when it was taken over, the property taken by the defendants, the manner of taking it and disposing of it, and the value of the property and the stock and the assets. And on these points evidence was persistently offered and as persistently objected to and excluded. And for such persistence the plaintiff was repeatedly threatened with contempt.

There was nothing to warrant the closing and the wrecking of the bank in the way it was done. Hence, all who took an active part in the wrecking were tort feorsors. This includes only those who were present, aiding or abetting or profiting by the wrecking. There was no sense or reason for making any other person a party to the action.

The plaintiff sued for \$50,000 damages. The case was tried before Judge Kneeshaw, who directed a verdict for the defendants. On the trial the plaintiff was represented by an attorney who knew more of socialism than of law and practice. He was completely outgeneraled by four shrewd old-time lawyers who opposed him. We call them the Big Four. In the story of Don Quixote we read how his squire, Sancho Panza, was tossed up in a blanket by some humorous rascals. And so it was on the trial of this case. The Big Four restrained their laughter while they dealt with our Socialist friend as if he were a second Sancho Panza. Of course, in a way, it was all very humorous, but it was trifling with the due administration of justice, and for that the big counsel do well deserve a severe rebuke. To every question there was an objection by one, two, three, or more of the big counsel, and the ruling was nearly always against the plaintiff. To the simple question: "How long have you been in the banking business?" there was an objection covering a page and a half.

To cap the climax, the court directed a verdict in favor of the defendants. An appeal to this court was filed on September 21st, 1916, and in some way it was rushed and advanced over a hundred pending appeals, and contrary to the rules of the court and the uniform practice. I never heard of anything like it. And without waiting for the filing of briefs, or the hearing of oral arguments, on December

28th, 1916, a final decision was given against Youmans. To say the least, it was given by a court of very questionable jurisdiction. Three of the judges were holding over after their term of office had expired and after their successors had been duly elected and qualified, and demanded the office. The holding-over judges improvised a court of four district judges to sanction their holding, and this they attempted to do contrary to mandate of the supreme court signed by the three newly elected and qualified supreme court judges. That was on December 5th, and long prior to the decision of the hold-over judges.

Now, under the Constitution, every supreme court judge has been elected to hold office for a term of years, commencing on the first Monday of December after his election. To the several judges there have been issued, pursuant to law, in all, twenty certificates of election, signed by the governor, the secretary of state and a member of the board of canvassers, and given under the great seal of the state. Each certificate shows that the person therein named was elected to the office for a stated term of years, commencing on the first Monday of December after his election. Of course, we cannot think that the twenty great seals and sixty official signatures were given to a falsehood, or that every judge was so simple as to accept his certificate with a false statement.

I concede that on December 28th, 1916, the hold-over judges were *de facto* judges, in just the same sense as they would be were they holding over until the present time.

Early in January, 1917, a motion was made to this court to reconsider the case and to grant a new trial. As Judges Grace and Birdzell declined to sit on the motion, two district judges were invited to take their place. When the motion was argued, the big counsel for the defendant talked of *de facto* courts and judges, and declined to say a word on the merits of the case. One of the district judges followed in the same line and wrote an opinion of some fifteen pages on *de facto* courts. The decision or write-up comes in its usual course after a lapse of two months, which is very different from the way in which the case was rushed and decided without any brief or argument in December.

I am entirely clear the ruling is radically wrong, and it is contrary to the avowed and deliberate judgment of three of the supreme court judges. On another motion, it is more than possible that the judges

of this court may reconsider and decide the case on its merits. Indeed, it is their bounden duty to do it on their own motion. It is a debt of justice and sooner or later it must be paid.

S. S. SUTHERLAND v. WILLIAM J. NOGGLE and George J. Brown, Sheriff of Stark County.

(160 N. W. 1000.)

Creditor—conveyance of—property to—by debtor—pre-existing indebtedness—in payment of—good faith—fraud—validity of transfer.

1. Where a creditor receives a conveyance of only so much property as is sufficient to satisfy a pre-existing indebtedness, and receives it in good faith for that purpose, the fact that he may know that his grantor is actuated by a desire to defraud his other creditors will not invalidate the transfer.

Trial de novo—supreme court—new trial—when necessary—accomplishment of justice.

2. Under § 7846, Compiled Laws (relating to trial *de novo* in the supreme court), a new trial will be ordered when the supreme court deems such course necessary to the accomplishment of justice.

Opinion filed December 30, 1916.

Appeal from the District Court of Stark County, *Crawford, J.*
Remanded for a new trial.

Thomas H. Pugh, for appellant.

The question of the fraudulent intent is one of fact, and not of law, under our statute, and no transfer of property may be adjudged fraudulent solely on the ground that it was not made for a valuable considera-

NOTE.—On what is participation by a creditor in the fraudulent intent of his debtor which will make a transfer to pay or secure his debt invalid as to other creditors, see notes in 31 L.R.A. 609, and 32 L.R.A. 71. The solution of the question would seem to depend upon the question of the good or bad faith of the purchaser or mortgagee.

On the right of a creditor to buy property from his debtor in satisfaction of his debt, see note in 36 L.R.A. 335.

On knowledge of vendee as affecting validity of fraudulent conveyance, see note in 34 Am. St. Rep. 395.

tion. *Black Hills Mercantile Co. v. Gardiner*, 5 S. D. 246, 58 N. W. 557; *Dalrymple v. Security Loan & T. Co.* 9 N. D. 306, 83 N. W. 245.

Nor will the relationship of the parties alone afford such ground. *Fluegel v. Henschel*, 7 N. D. 276, 66 Am. St. Rep. 642, 74 N. W. 996.

The grantor in an alleged fraudulent conveyance may testify as to what his intent in fact was. 6 Enc. Ev. 130; *Brown Bros. v. Potter*, 13 Colo. App. 512, 58 Pac. 785; *Love v. Tomlinson*, 1 Colo. App. 516, 29 Pac. 666; *Seymour v. Wilson*, 14 N. Y. 567.

Retention of possession of the property by the grantor would not be evidence that same was not made in good faith. *Scholle v. Finnell*, 167 Cal. 90, 138 Pac. 746.

Evidence of other frauds committed by the grantor in which the grantee did not participate, not receivable. 6 Enc. Ev. 149 and cases cited.

The grantee in such cases is not in duty bound to inquire as to the fraudulent intent of the grantor, unless he has actual knowledge of some suspicious circumstances sufficient to put a prudent man upon inquiry. *Wannemacher v. Merrill*, 22 N. D. 46, 132 N. W. 412; *Fluegel v. Henschel*, *supra*.

Notice of fraud must be clear and undoubted with respect to prior rights, and sufficiently strong to make it fraudulent for the grantee to take and hold the property, and must be before the transaction. *Raymond v. Flavel*, 27 Or. 219, 40 Pac. 158; *Ball v. Danton*, 64 Or. 184, 129 Pac. 1039; *Urdangen & G. Bros. v. Doner*, 122 Iowa, 533, 98 N. W. 317.

Where a creditor receives only so much of the property of the grantor as will satisfy a pre-existing debt, the fact that he may know that his grantor is actuated by a desire to defraud his other creditors will not taint the transaction. *Lockren v. Rustan*, 9 N. D. 43, 81 N. W. 60, and cases cited; 20 Cyc. 472; *Atlantic Ref. Co. v. Stokes*, 77 N. J. Eq. 119, 75 Atl. 445; *National Surety Co. v. Udd*, 65 Wash. 471, 118 Pac. 347; *Kerns v. Washington Water Power Co.* 24 Idaho, 525, 135 Pac. 70; *First Nat. Bank v. Eichmeier*, 153 Iowa, 154, 133 N. W. 454; *Sly v. Bell*, 131 Iowa, 184, 117 Am. St. Rep. 417, 108 N. W. 227; *G. Ober & Sons Co. v. Phillips-Burtoff Mfg. Co.* 145 Ala. 625, 40

So. 278; *Whiting v. Hoglund*, 127 Wis. 135, 106 N. W. 391, 7 Ann. Cas. 224; *Jackson v. Citizens Bank & T. Co.* 53 Fla. 265, 44 So. 516; *State use of Salomon v. Mason*, 112 Mo. 347, 34 Am. St. Rep. 390, 20 S. W. 629.

The complaining creditor must show the grantee's participation in the fraud of which complaint is made. *Blumer v. Bennett*, 44 Neb. 873, 63 N. W. 14; *Steinberg v. Buffum*, 61 Neb. 778, 86 N. W. 491; *Holt Mfg. Co. v. Bennington*, 73 Wash. 467, 132 Pac. 30; *Scholle v. Finnell*, 167 Cal. 90, 138 Pac. 746; *Commercial Nat. Bank v. Page*, 45 Utah, 14, 142 Pac. 709.

F. C. Heffron and *L. A. Simpson*, for respondents.

It is sufficient to void a transfer as to all creditors if it is fraudulent as to one or any part of the creditors. *Daisy Roller Mills v. Ward*, 6 N. D. 317, 70 N. W. 271; *Burt v. C. Gotzian & Co.* 43 C. C. A. 59, 102 Fed. 937; *Shauer v. Alerton*, 151 U. S. 607, 38 L. ed. 286, 14 Sup. Ct. Rep. 442; *Comp. Laws* 1913, §§ 7220, 7290; *Salemonson v. Thompson*, 13 N. D. 182, 101 N. W. 320.

Transfers which defraud creditors, when made to relatives, are looked at and scrutinized much more closely and require much less evidence to set them aside, than if made to strangers. *Whitson v. Griffis*, 39 Kan. 211, 7 Am. St. Rep. 546, 17 Pac. 801; *Plummer v. Rummel*, 26 Neb. 142, 42 N. W. 336; *Missinskie v. McMurdo*, 107 Wis. 578, 83 N. W. 758; *Mellier v. Bartlett*, 106 Mo. 381, 17 S. W. 295; *Burt v. Timmons*, 29 W. Va. 441, 6 Am. St. Rep. 664, 2 S. E. 780.

And in such cases the relative is presumed to know the character of the transaction. *Robson v. Hamilton*, 41 Or. 239, 69 Pac. 651; *Lusk v. Riggs*, 70 Neb. 713, 97 N. W. 1033, 102 N. W. 88; *Goodale v. Wheeler*, 41 Or. 190, 68 Pac. 753.

A preference to a relative is also presumed to be fraudulent. *Mendenhall v. Elwert*, 36 Or. 375, 52 Pac. 22, 59 Pac. 805; *Heffley v. Hunger*, 54 Neb. 776, 75 N. W. 53; *Stauffer v. Kennedy*, 47 W. Va. 714, 35 S. E. 892; *Bank of Colfax v. Richardson*, 34 Or. 518, 75 Am. St. Rep. 664, 54 Pac. 359; *Flint v. Chaloupka*, 78 Neb. 594, 13 L.R.A. (N.S.) 309, 126 Am. St. Rep. 639, 111 N. W. 465; *Simon v. Reynolds-Davis Grocery Co.* 108 Ark. 164, 156 S. W. 1015.

Where the findings of the trial court are supported by substantial evidence, even though the entire evidence is conflicting, they should not

be disturbed. *Caledonia Gold Min. Co. v. Noonan*, 3 Dak. 189, 14 N. W. 426; *State ex rel. Morrill v. Massey*, 10 N. D. 154, 86 N. W. 225; *Webster v. White*, 8 S. D. 479, 66 N. W. 1145; *Caufield v. Bogle*, 2 Dak. 464, 11 N. W. 511; *First Nat. Bank v. Prior*, 10 N. D. 146, 86 N. W. 362; *Steinfort v. Langhout*, 170 Iowa, 422, 152 N. W. 612.

One who has a valid, unquestioned judgment against his debtor in and by a court of competent jurisdiction is a creditor as against the fraudulent grantee of his judgment debtor. *Salemonson v. Tuompson*, 13 N. D. 182, 101 N. W. 320.

The question of fraudulent intent is one of fact, and not of law, and the trial court in this case expressly found that there was fraudulent intent, and such finding should not be disturbed. *Paulson v. Ward*, 4 N. D. 100, 58 N. W. 792; *Meighen v. Chandler*, 20 N. D. 238, 126 N. W. 992.

Where the circumstances clearly show that the property was transferred for the purpose of placing it beyond the reach of the grantor's creditors, the transfer is fraudulent. *Burt v. C. Gotzian & Co.* 43 C. C. A. 59, 102 Fed. 937.

The judgment finally entered in pursuance of the litigation between the original parties should be binding upon the judgment debtor's grantee the same as it is between the parties. *Decker v. Decker*, 108 N. Y. 128, 15 N. E. 307; *Gracey v. Davis*, 3 Strobb. Eq. 55, 51 Am. Dec. 663; *Watt v. Morrow*, 19 S. D. 317, 103 N. W. 45; *Soly v. Aasen*, 10 N. D. 108, 86 N. W. 108; *Lyon v. Plankington Bank*, 15 S. D. 400, 89 N. W. 1017; *Fluegel v. Henschel*, 7 N. D. 276, 66 Am. St. Rep. 642, 74 N. W. 996; *Satterwhite v. Hicks*, 44 N. C. (Busbee, L.) 105, 57 Am. Dec. 577; *Kansas Moline Plow Co. v. Sherman*, 3 Okla. 204, 32 L.R.A. 33, 41 Pac. 623; *Newell v. Wagness*, 1 N. D. 62, 44 N. W. 1014; *Billings v. Russell*, 101 N. Y. 226, 4 N. E. 531; *Marcus v. Leake*, 4 Neb. (Unof.) 354, 94 N. W. 100; *Garland v. Rives*, 4 Rand. (Va.) 282, 15 Am. Dec. 756; *Morley Bros. v. Stringer*, 133 Mich. 690, 95 N. W. 978; *Barhydt v. Perry*, 57 Iowa, 416, 10 N. W. 820; *Welch v. Bradley*, 45 Minn. 540, 48 N. W. 440; *Bostwick v. Blake*, 145 Ill. 85, 34 N. E. 38.

PER CURIAM.

This is an action to quiet title to a tract of land in Stark county, and

to restrain the sheriff of said county from selling the same upon an execution issued upon a judgment rendered in an action in the district court of Stark county, entitled William J. Noggle, Plaintiff, v. G. W. McClellan, Defendant.

The trial court made the following findings of fact and conclusions of law:

Findings of fact.

1. That plaintiff, S. S. Sutherland, is a brother-in-law of said McClellan, and that Mark Sutherland is the father of plaintiff and the father-in-law of said McClellan.

2. That William J. Noggle was a partner of said McClellan in the coal and cement business in Dickinson for some time prior to May 29, 1911, and on that date, after some dispute, they dissolved partnership, said McClellan giving said Noggle in settlement certain notes upon which an action was brought in said district court, entitled William J. Noggle, Plaintiff, v. G. W. McClellan, doing business under the name of Dickinson Cement and Coal Company, Defendant, in which action a judgment was duly entered and docketed in favor of said Noggle and against said McClellan for seven hundred eight and 3/100 (\$708.03) dollars on December 22, 1911, which judgment has not been paid; that at the time of commencing said action a writ of attachment was duly issued pursuant to which a levy was duly made on said premises by the sheriff of said Stark county.

3. That prior to May, 1911, said McClellan had purchased upon a contract said land from W. L. Richards and Charles Bakke, together with the south half of the same quarter section, and in May, 1911, owed said Richards and Bakke seven hundred (\$700) dollars on the purchase price of said land. That, by fraudulent importunities by said McClellan, said Richards and said Bakke were induced to give said McClellan a deed to said land, and took a note from said McClellan for seven hundred (\$700) dollars, which has never been paid.

4. That immediately after obtaining said deed and after giving said notes to said Noggle, said McClellan began disposing of his property, principally to S. S. Sutherland and said Mark Sutherland; that he gave said Mark Sutherland a bill of sale on June 1, 1911, of a large part of his personal property, to which bill of sale said S. S. Sutherland

was a witness, and which personal property was retained in the possession of said McClellan after June 1, 1911, to the same extent as before; that on June 1, 1911, he transferred his coal business to Schiller Brothers; that at about the same time he gave the Dakota National Bank a chattel mortgage on other personal property for sixteen hundred (\$1,600) dollars; that at about the same time he gave a bill of sale of his cement business to Anderson and Himmelspace, but continued to take cement contracts in his own name and for his own benefit under his established firm name of Dickinson Cement Company; that on June 7, 1911, with intent to defraud said Richards and Bakke and other creditors, said McClellan transferred said land to S. S. Sutherland; that said McClellan was owing said S. S. Sutherland the amount of seventeen hundred (\$1,700) dollars, which was approximately the value of the premises, upon a note dated May 17, 1911, due ninety days from date; that said S. S. Sutherland immediately thereafter mortgaged said land for five hundred thirty (\$530) dollars, and soon thereafter sold the south half of said southeast quarter to Dorothea W. Schweiger for twenty-four hundred (\$2,400) dollars.

5. That said transfers by said McClellan, including said transfer of said land by said McClellan to plaintiff, were made by said McClellan with an intent to defraud said McClellan's creditors and to hinder and delay them in the collection of their debts, and plaintiff knew, or should have known, that the said transfers to him and to others were made for said fraudulent purposes, and that said transfer of said land was not made in good faith.

From the foregoing findings of fact the court makes the following

Conclusions of law.

1. That said transfer by said deed from George W. McClellan to plaintiff on June 7, 1911, of the northeast quarter and the south half of the southeast quarter of section twenty-four (24), township, one hundred forty (140) north, range ninety-six (96), west of the 5th P. M., was not made in good faith and was fraudulent and void as to the creditors of said McClellan.

2. That on June 7, 1911, defendant William J. Noggle was a creditor of George W. McClellan.

3. That defendant William J. Noggle is entitled to a judgment here-

in making his said attachment and judgment against said McClellan a valid lien on the northeast quarter of said southeast quarter of said section, and that said Noggle is entitled to have said land sold to satisfy said judgment.

Judgment was entered in accordance with these findings and conclusions, and plaintiff appeals, demanding a trial *de novo* in this court.

If the trial court's findings to the effect that McClellan transferred the land in question to Sutherland for a pre-existing indebtedness of \$1,700, "which was approximately the value of the premises," are correct, then the fact that McClellan may have intended by such transfer to prefer Sutherland over his other creditors, or even intended to defraud his other creditors, would not invalidate the transfer. *Lockren v. Rustan*, 9 N. D. 43, 81 N. W. 60; *Merchant's Nat. Bank v. Collard*, 33 N. D. 556, 157 N. W. 488.

In determining a similar question in *Lockren v. Rustan*, *supra*, this court said: "It has been held many times that where the grantee participated in the fraudulent intent, the fact that he paid full consideration would not save the conveyance when attacked by creditors of the grantor. See *Wait*, *Fraud. Conv.* 3d ed. § 201. But this rule in its entirety applies only to cases of purchase for a present consideration, and in such cases it is held that where the grantee purchases with knowledge of the fraudulent intent on the part of his grantor, that fact alone fixes his participation in the fraud. *Greenleve v. Blum*, 59 Tex. 127; *Wait*, *Fraud. Conv.* 3d ed. § 199. *But a different rule prevails where the conveyance is made in satisfaction of a pre-existing indebtedness. There the effect of the transaction is to prefer one creditor to another, and that a debtor has a right to do unless restrained by statute. If the creditor receives only so much property as is reasonably necessary to satisfy his debt, and receives it in good faith for that purpose, the fact that he may know that his grantor is actuated solely by a desire to defraud his other creditors will in no manner taint the transaction.* [Citation of authorities.] The reasons that have been assigned for the distinction between one who purchases for a present consideration and one who purchased in satisfaction of a pre-existing debt are sound and unassailable. The former is in every sense a volunteer. He has nothing at stake,—no self-interests to serve. He may, with perfect safety, keep out of the transaction. Having no motive of interest prompting him

to enter it, if yet he does enter it, knowing the fraudulent purpose of the grantor, the law, very properly, says that he enters it for the purpose of aiding that fraudulent purpose. Not so with him who takes the property in satisfaction of a pre-existing indebtedness. He has an interest to serve. He can keep out of the transaction only at the risk of losing his claim. The law throws upon him no duty of protecting other creditors. *He has the same right to accept a voluntary preference that he has to obtain a preference by superior diligence. He may know the fraudulent purpose of the grantor, but the law sees that he has a purpose of his own to serve, and, if he go no further than is necessary to serve that purpose, the law will not charge him with fraud by reason of such knowledge.*"

Consequently, if the facts are as found by the trial court, the judgment should be reversed and judgment rendered in favor of the plaintiff. Respondents' counsel, upon the oral argument, asserts, however, that the trial court was in error in finding that McClellan was indebted to Sutherland in the sum of \$1,700, or anywhere near that amount. Respondents' counsel claims that the several notes are renewals and represent the same indebtedness. This question was not referred to in the printed brief, and while there is much force in respondents' contention, the evidence upon this feature of the case is not so full or persuasive that we feel justified in saying that the trial court erred in its finding with respect thereto. It appears to us, however, that the cause was tried upon this theory, and the trial court assumed the law to be contrary to that announced by this court in *Lockren v. Rustan*, *supra*, and that neither the trial court nor counsel considered the question of the amount of such indebtedness of any controlling importance herein.

A majority of this court is therefore of the opinion that the ends of justice would be best subserved by permitting a retrial of this issue. And under the precedent set by *Landis v. Knight*, 23 N. D. 450, 137 N. W. 477, and *Williams County State Bank v. Gallagher*, *ante*, 24, 159 N. W. 80, a retrial of the action is ordered.

It is further ordered that the costs of this appeal abide the result of such new trial.

BURKE, J. (dissenting). The first opinion of this court affirming the judgment meets with my present views. It is our duty to try the issues

and end this litigation. No more evidence can be adduced next trial, and nothing is to be gained by remanding the case. I therefore dissent.

CHARLES J. CLARK v. H. W. ELLINGSON, F. T. Gronvold, H. J.
Sannon et al.

(161 N. W. 199.)

Claim and delivery — redelivery undertaking — breach of — damages — action for.

1. In an action to recover damages for an alleged breach of a redelivery undertaking executed by defendants as sureties in a claim and delivery action, certain rulings in defendants' favor rejecting offered testimony, examined and *held* proper.

Redelivery undertaking — action for damages on — breach of — issues — jury — evidence — sufficiency.

2. In an action to recover for the alleged breach of a redelivery undertaking in claim and delivery, one of the issues tried was whether the property involved in such prior action had been redelivered to plaintiff pursuant to the judgment. Plaintiff's contention that such issues was erroneously submitted to the jury because of alleged insufficiency of the evidence, *held*, untenable.

Redelivery undertaking — sureties — judgment in claim and delivery — concluded by — exceptions — issues — not adjudicated in former action.

3. The general rule that sureties in a redelivery undertaking given in a claim and delivery action are, in the absence of fraud or collusion, concluded by the judgment against their principal in the claim and delivery action, has well-recognized exceptions. They are not thus concluded as to matters not within the issues, and therefore not adjudicated in such action. Not being parties to such prior action, the judgment rendered therein is *res judicata* as to such sureties only as to such issues as were therein properly raised, tried, and determined.

Pleading — amendment — granting relief to amend — does not amount to — must be actually amended.

4. Following the decision in *Satterlund v. Beal*, 12 N. D. 122, *held*, that the mere granting of leave to amend a pleading does not amend it. Such permission must be acted upon and the pleading redrawn, covering the desired amendment, and if this is not done, the amendment is deemed abandoned.

Opinion filed December 30, 1916.

Appeal from District Court, Pierce County, *A. G. Burr, J.*

Action to recover damages for the breach of a redelivery undertaking in claim and delivery.

Defendants had judgment as prayed for in the answer, and plaintiff appeals.

Affirmed.

D. C. Greenleaf and Bradford and Nash, for appellant.

Where an amendment to a pleading has been allowed, but the pleading not actually amended, a failure to object to evidence offered as though the pleading has so been amended is a waiver of such objection. *McLain v. Nurnberg*, 16 N. D. 144, 112 N. W. 243; *Connor v. National Bank*, 7 S. D. 439, 64 N. W. 519.

And the question cannot be taken advantage of for the first time on appeal. *Caledonia Gold Min. Co. v. Noonan*, 3 Dak. 189, 14 N. W. 428.

Further, objections having in mind such failure to amend, must be specific, the general objection not availing. *Pyke v. Jamestown*, 15 N. D. 157, 107 N. W. 359.

In replevin actions the bondsmen cannot defend on the ground that the verdict and judgment in replevin are not full and complete. *Sweeney v. Lomme*, 22 Wall. 208, 22 L. ed. 727; *Cobbey, Replevin*, 2d ed. 795.

The sureties stand in the same position as the principal so far as the definitinal force of the judgment is concerned, in the absence of fraud or collusion between the parties to the former action. *Riddle v. Baker*, 13 Cal. 295; *Cox v. Sargent*, 10 Colo. App. 1, 50 Pac. 203; *Richardson v. People's Nat. Bank*, 57 Ohio St. 299, 48 N. E. 1100.

It will be presumed that the pleadings and verdict are sufficient to sustain the judgment. *McMurchy v. O'Hair*, 67 Ill. 242; *Hawley v. Warner*, 12 Iowa, 42; *Charleston v. Price*, 1 M'Cord, L. 299.

Albert E. Coger, for respondents.

The amendment allowed in the former action (claim and delivery) was never consummated, so far as the sureties on the redelivery bond are concerned, and their failure to amend was not waived by the sureties. *Satterlund v. Beal*, 12 N. D. 127, 95 N. W. 518.

The sureties are not bound by a judgment for absolutely foreign items, erroneously included, in such manner that segregation is impossi-

ble, and for which condition plaintiff alone is responsible. *Farmers Nat. Bank v. Ferguson*, 28 N. D. 352, 148 N. W. 1049; *Smith v. Willoughby*, 24 N. D. 1, 138 N. W. 7; *Larson v. Hanson*, 21 N. D. 411, 131 N. W. 229.

It will be presumed in support of the judgment in such cases that the proof at the trial disclosed that a delivery of the property involved could not be had, as against defendant. But no such rule applies to the sureties. *Brown v. Johnson*, 45 Cal. 76; *Claudius v. Aguirre*, 89 Cal. 501, 26 Pac. 1077; *Faulkner v. First Nat. Bank*, 130 Cal. 258, 62 Pac. 463; *Erreca v. Meyer*, 142 Cal. 308, 75 Pac. 826, and cases cited; *Park v. Robinson*, 15 S. D. 551, 91 N. W. 344; *New England Furniture & Carpet Co. v. Bryant*, 64 Minn. 256, 66 N. W. 974; *Gallarati v. Orser*, 27 N. Y. 324; *Dwight v. Enos*, 9 N. Y. 470; *Fitzhugh v. Wiman*, 9 N. Y. 559.

FISK, Ch. J. Plaintiff seeks to recover against the defendants and respondents as sureties on a redelivery undertaking given in a certain claim and delivery action wherein this plaintiff was plaintiff and one Pat Buoye was defendant, involving the right to the possession of a certain stallion of the alleged value of \$1,000. The complaint in such prior action merely alleged plaintiff's ownership and right to the immediate possession of such animal, and that defendant Buoye wrongfully detained the same from plaintiff, after a demand for possession thereof, and that such stallion was of the value of \$1,000. Judgment for the immediate delivery of the animal or for \$1,000 in case delivery thereof cannot be had was prayed for, together with the costs and disbursements of the action. It is important here to note the fact that such complaint contained no intimation whatever of any claim for damages either for the alleged wrongful detention or for moneys spent in pursuit of the animal, attorneys' fees, or otherwise. In brief, plaintiff by such complaint evidently elected to limit his redress to a return of the property, or its value in case a return could not be had, and respondents became sureties on the defendant Buoye's redelivery undertaking, with knowledge that plaintiff had thus elected to restrict his right of recovery. Notwithstanding this, plaintiff at the trial of such prior action asked for and was granted, over defendant's objection, leave to amend his complaint by incorporating therein a claim for damages, in the sum of

\$1,000 for detention of such animal, and for attorneys' fees and expenses incurred in pursuit of such horse, and by enlarging his prayer for judgment so as to embrace such additional claims. The trial in such claim and delivery action resulted in a verdict in plaintiff's favor, awarding him, among other things, such additional relief in the sum of \$915. Judgment was entered accordingly, from which no appeal was taken. Whether it was error to grant such motion to amend the complaint is not here important, nor is it important to decide whether, as to Buoye, the amendment was ever made so as to become effective. We are here concerned only with the legal rights of the parties in the case at bar.

The complaint is in the usual form, alleging the recovery by plaintiff against Pat Buoye of a judgment in such prior action for the return of such stallion, or for its value in the sum of \$1,000 in case a return cannot be had; also for the further sum of \$915 as damages for the detention of the horse and moneys expended for attorneys' fees, etc., in pursuit of the property, and \$66.15 costs, making a total of \$1981.15. That such property was taken into plaintiff's possession at the commencement of such claim and delivery action and rebonded by defendant therein through the giving of the usual undertaking for that purpose in the penal sum of \$2,000, signed by these defendants as sureties. That, subsequent to the rendition of judgment, execution was issued and returned that said horse could not be found, and it is also therein alleged that no return thereof to plaintiff has ever been made, and no part of the judgment paid or satisfied.

The answer puts in issue each allegation in plaintiff's complaint except the fact that he recovered a judgment against Buoye in the claim and delivery action for the return of such horse, or for the sum of \$1,000 in case a return cannot be had, and for \$66.15 costs. Then follows an allegation that immediately after the rendition of such judgment the defendants duly delivered to, and the plaintiff accepted, such stallion, in substantially the same condition as when rebonded, thus satisfying such judgment *pro tanto*, and the defendants therein offered to allow plaintiff to take judgment for the amount of such costs and \$5 in addition thereto, with interest, and also all accrued costs of this action.

The answer also contains new matter by way of defense in substance

as follows: The complaint in the prior action is set forth in full, together with the averment that the same was, at the commencement of such action, January 30, 1908, served with the summons, the affidavit, and the undertaking and notice in claim and delivery. That Buoye was a man of no financial responsibility. That in becoming sureties for Buoye on the redelivery bond they relied upon the fact that no claim for damages of any nature was made in the plaintiff's complaint, and they were thereby induced to become such sureties, believing in good faith that they were thereby assuming no liability beyond that of returning the horse, if a return should be adjudged or paying its value in case a return could not be made, and also for any costs of the action adjudged to plaintiff. That no amendment of the complaint in said action was ever in fact made, and defendants had no knowledge of any request to amend such complaint as aforesaid, nor did they consent thereto. That by reason of these facts plaintiff is estopped as against these defendants from recovering the item of \$915 awarded as damages aforesaid, and they pray that plaintiff be given judgment only for costs adjudged in such prior action with interest, and for accrued costs in the case at bar up to the date of the service of such answer.

A reply to such affirmative defense was served and filed, although this was unnecessary in order to form an issue as to the truth of the allegations in the answer, for they were in law deemed denied. At the trial, such reply was withdrawn and a demurrer interposed to such defensive matter in the answer upon the ground that it failed to state sufficient facts to constitute a defense. Such demurrer was overruled, and proof of such defense was made. In fact the order for judgment recites that there was no controversy as to such facts. In the light of this, the learned trial court eliminated from the jury's consideration the plaintiff's said claim for damages in the sum of \$915, and submitted but two questions to the jury as follows:

Question one: Did the defendants deliver to the plaintiff, on or about June 15, 1909, that certain stallion involved in this action, in substantially as good condition as when delivered to Pat Buoye under the redelivery bond, and without deterioration in value?

Answer: Yes.

Question two: Did the plaintiff, Charles J. Clarke, accept from the

defendants the stallion involved in this action, on or about the 15th day of June, 1909?

Answer: Yes.

Judgment was accordingly rendered in plaintiff's favor in conformity with the prayer of the answer, merely for the costs of the prior action, with interest, from which judgment, plaintiff has appealed.

While numerous specifications of error are alleged, there are but three propositions discussed in the briefs, and we need notice none other.

Under appellant's first point he contends that prejudicial error was committed in rejecting certain evidence offered by him tending to negative defendants' claim that the horse was returned to and accepted by plaintiff in good condition, etc. He also contends that the uncontradicted testimony discloses that the horse was not in as good condition as when the redelivery undertaking was given and under which Buoye obtained possession of such stallion.

There is no merit in either contention. The ruling complained of sustained defendants' objection to the introduction in evidence of a certified copy of a certain chattel mortgage, filed in Pierce county, claimed to have been given by one Weigel to secure a note for \$900, running to Ellingson & Gronvold Hardware Company and representing the purchase price of the horse which was sold by Buoye to said Weigel. This testimony was offered as stated in appellant's brief "on the theory that the filing of the certified copy with the register of deeds of Pierce county would tend to show that the defendants, or some one of them was instrumental in bringing the horse from McHenry to Pierce county, and would in a large measure support the testimony of the plaintiff and his witness, and tend to discredit the statement of the defendant bondsmen as made by them upon the witness stand.

"Further in connection with said chattel mortgage, the witness Gronvold . . . was asked by counsel for plaintiff if it was not a fact that the Ellingson & Gronvold Hardware Company had a chattel mortgage on the horse, and that said chattel mortgage had never been satisfied of record, and whether or not at the time of the alleged delivery of the horse to Clark the horse was not free and clear of encumbrance, and whether or not Mr. Clark was informed by him that the

horse was free and clear, to all of which questions the court sustained the objections of defendant's counsel."

The offer was made on the theory that the plaintiff would not knowingly accept a horse of the value of this horse, if the same was at the time encumbered by the \$900 mortgage, and that by reason of the ruling of the court the rights of the plaintiff were prejudiced."

Exhibit 16, being the original of such chattel mortgage, was offered and received in evidence. It is dated April 10, 1909, and filed in McHenry county April 12 of that year. The certified copy was filed by some one in Pierce county in July, 1909, but there is no proof connecting any of the defendants therewith. This filing was made shortly after the verdict was returned in the action of Clark v. Buoye finding plaintiff to be the owner of such stallion. Surely, without some foundation being first laid connecting the defendants with the filing of such copy in Pierce county, such evidence was properly rejected, as it could not legally serve as any admission of defendants, by conduct or otherwise, to impeach or discredit their testimony as to the return to and acceptance by plaintiff of the animal in compliance with the conditions of their undertaking.

Upon the contested issue as to whether such stallion was returned to, and accepted by, plaintiff and that he was in good condition, there is a square conflict in the evidence. This being true, it was not error to submit such question to the jury, and we are bound by the findings of the jury in defendants' favor.

Appellant's second point relates to the alleged insufficiency of the evidence as to the return of the horse to and acceptance thereof by him, and the same being already sufficiently answered, need not be further considered.

Appellant's third and last point relates to his alleged right to recover from these defendants the damages for detention, attorneys' fees, traveling expenses in pursuit of the property, etc., embraced in the alleged amendment of his complaint in the prior action, and found in his favor by the verdict of the jury in that action. Conceding for the sake of argument, that such amendment was made and is binding on these sureties, it is entirely clear that a considerable portion of such so-called damages were improperly allowed. We deem this not important or controlling, however, for as we view it these defendants cannot be

held liable on their bond for any of such damages. Our reasons for this conclusion will now be briefly stated.

While the general rule is that sureties on a redelivery undertaking are concluded by the judgment against their principal in the claim and delivery action in the absence of fraud or collusion, this rule, for obviously sound reasons, has well-recognized exceptions. For instance, the prior judgment against the principal is not *res judicata* as to the sureties except as to the matters properly and actually adjudicated thereby. If, in other words, questions wholly foreign to the case, and not put in issue by the pleadings, are therein attempted to be adjudicated, the sureties, not being parties thereto, are clearly not concluded by the judgment. This is both elementary and self-evident.

This court has announced such rule in the following language: "Defendants (sureties) were not parties to that action, and therefore are not bound by the judgment except as to those issues properly therein litigated." *Farmers Nat. Bank v. Ferguson*, 28 N. D. 352, 148 N. W. 1049. See also *Larson v. Hanson*, 21 N. D. 411, 131 N. W. 229; *New England Furniture & Carpet Co. v. Bryant*, 64 Minn. 256, 66 N. W. 974.

The inquiry, therefore, arises whether, as to these sureties, the question of damages was properly litigated in the prior action so as to render the judgment therein *res judicata* as to them. In other words, was the question of damages for detention of the horse an issue in that case as to them? We think this must be answered in the negative. The complaint is silent as to any damages for detention suffered by plaintiff; and, while leave to amend was asked for and granted, it appears, in fact it is conceded, that plaintiff never availed himself of such permission by amending his complaint. That it was incumbent upon him to do so is settled in this state. See *Satterlund v. Beal*, 12 N. D. 122, 95 N. W. 518, and authorities cited. We quote from the syllabus as follows: "The mere granting of leave to amend a pleading does not amend it. Unless the leave is acted upon and the pleading redrawn, including the desired change, the amendment is deemed abandoned." There was, therefore no support in the complaint for a recovery of such damages, and no issue framed in the pleadings as a basis for the jury's finding on the question of damages, nor can it be said that these defendants have in any way waived or estopped themselves from urging this

point. This being true, it follows as a matter of course that as to these sureties, at least, there is no breach of their bond for failing to satisfy that portion of the judgment relating to damages. Such, no doubt, were the views of the learned trial court in refusing to submit to the jury the question of damages, and restricting them to a consideration solely of the questions as to whether on or about June 15, 1909, the defendants returned the horse to plaintiff and he accepted him back in good condition.

The above is, we think, a sufficient answer to appellant's contentions, and leads to an affirmance of the judgment. But we think there is at least one other tenable ground upon which a like conclusion might be reached, and which we will here briefly notice.

These sureties, not being parties to the claim and delivery action, ought not to be bound by the judgment rendered therein except as to the portions thereof having some proper support in the evidence. The record discloses that the plaintiff asked leave to amend so as to recover damages consisting of items not only for the wrongful detention of the property, but for money spent in pursuit thereof, and attorneys' fees, including traveling expenses, etc. Manifestly some of these items relating to attorneys' fees, traveling expenses, etc., were improperly included in the recovery, and the jury's finding fails to disclose how much was allowed for the various expenditures. The finding was as follows:

"We, the jury, in the above entitled action, find that the damages and the value of the use of said property is in the sum of \$915."

Plaintiff's failure in the claim and delivery action to obtain a proper adjudication as to his damages operates to defeat a recovery therefor from these sureties, even if an issue involving damages for the detention had been properly raised in the pleadings.

Judgment affirmed.

CHRISTIANSON, J., took no part in the above opinion, Judge J. M. Hanley of the Twelfth Judicial District sitting in his place by request.

E. R. REITSCH and W. C. McClintock v. JOHN McCARTY.

(160 N. W. 694)

Sheriff's certificate — assignment of — purchaser — fraud or deception — validity of assignment — question by parol evidence — intention — redemption.

1. Where no fraud or deception has been practised by the purchaser, a person will not be allowed to question by parol evidence the validity of an assignment of a sheriff's certificate, and to contend that he executed the same intending it to be a certificate of redemption.

Fraud — proof of — clear and convincing — facts — honest purpose.

2. Proof of fraud must be clear and convincing, and be evidenced by facts which are inconsistent with an honest purpose.

Sheriff's certificate — assignment of — evidence — parol — intention of parties — purchaser — redemption — trustee.

3. Evidence examined and *held*, not to justify the contention that the assignments of certain sheriff's certificates were either intended to be certificates of redemption, or were made to the purchaser not for himself, but as a trustee.

Opinion filed September 14, 1916. Rehearing denied December 30, 1916.

Appeal from the District Court of Pierce County, *Burr, J.*

Action to determine adverse claims.

Judgment for plaintiffs. Defendant appeals.

Reversed.

Statement of facts by BRUCE, J.

The complaint in this action is in the statutory form of an action to determine adverse claims to three quarter sections of land. It alleges that the plaintiffs have liens or encumbrances upon the real estate described; that the defendant claims some estate or interest or lien or encumbrance in or upon the same adverse to the plaintiff, and prays that the defendant be required to set forth his adverse claims, and that their validity and priority may be determined; that the same be adjudged null and void, and that the defendant be decreed to have no estate or interest in, or lien or encumbrance upon, said property, and that the title be quieted as against said claim of the defendant.

The answer alleges that on the 1st day of December, 1905, W. C. McClintock was the owner of one of these quarters; that on said date he mortgaged it to the Merchants Bank of Rugby; that on or about January 28, 1908, said mortgage was foreclosed and a sheriff's certificate delivered to said bank; that thereafter and on January 22, 1909, said certificate was assigned for a valuable consideration to the defendant, John McCarty, and thereafter and on July 16, 1909, a sheriff's deed was duly delivered to him, and that he now claims title under the same.

The answer further alleges that on the 1st day of May, 1905, one Theo. P. Scotland was the owner of another of these quarter sections; that on May 1, 1905, he mortgaged the land to the said bank; that thereafter, default being made, this mortgage was foreclosed, and on the 28th day of January, 1908, a sheriff's certificate was delivered to said bank as purchaser; that thereafter and on the 22d day of January, 1909, said bank sold and assigned said certificate for a valuable consideration to the said John McCarty; and thereafter and on the 16th day of July, 1909, and no redemption having been made, a sheriff's deed was delivered to said John McCarty under which he now claims title. The answer further alleges that on the 3d day of December, 1904, one Nassif Boussad was the owner of the third quarter; that on the 3d day of December, 1904, said Boussad mortgaged said land to the said Merchants Bank; that thereafter said mortgage was foreclosed, and on the 28th day of January, 1908, a sheriff's certificate was delivered to the said Merchants Bank as purchaser at the sale; that thereafter and on or about the 22d day of January, 1909, said certificate was assigned by the said bank for a valuable consideration to said defendant, John McCarty; that thereafter, no redemption being made, the said McCarty obtained a sheriff's deed thereunder and under which he now holds and claims title.

The answer then prays that the title of the defendant McCarty be quieted as against the claim of the plaintiffs.

To this answer a reply was filed, which admits the execution of the notes and mortgages referred to in the answer, and the foreclosure of the mortgages, and the execution and delivery of the sheriff's certificates and sheriff's deeds, but denies the ownership of the defendant McCarty and the assignment of the sheriff's certificates to him.

It alleges that Theo. P. Scotland & Company was a domestic corporation; that Theo. P. Scotland is and was the secretary, treasurer, and a stockholder thereof; that his wife, Clara M. Scotland, was and is a stockholder; that on the 12th day of May, 1905, Theo. P. Scotland was and still is the owner of the southeast quarter, and lot 5, in section 30, and lots 1 and 2, in section 31, township 156, range 72; and of the southeast quarter of section 5 of said township and range; that on the 29th day of March, 1906, Theo. P. Scotland & Company was the owner of the southwest quarter of the northwest quarter and the north half of the southwest quarter, and the southeast quarter of the southwest quarter of section 28, township 156, range 72, subject to the mortgage of the Merchants Bank of Rugby, executed by Nassif Boussad and wife, described in the complaint and the payment of which mortgage the said Scotland & Company had assumed; that on the 12th day of May, 1905, both the said Theo. P. Scotland and the said Theo. P. Scotland & Company were indebted to the Merchants Bank of Rugby, and on said day and for the purpose of securing said indebtedness and of securing the payment of money to be thereafter loaned to them, and any and all future indebtedness to the said bank, the said Theo. P. Scotland and Clara M. Scotland, his wife, executed and delivered to the plaintiff W. C. McClintock warranty deeds of the southeast quarter of the southeast quarter, lot 5, in section 30, and the southeast quarter of section 5, in township 156, range 72, it being understood that the said McClintock should hold said property in trust for the said Merchants Bank, and as security for the payment of the indebtedness hereinbefore mentioned; that on the 29th day of March, 1906, Theo. P. Scotland & Company executed and delivered to the said W. C. McClintock, to be held in trust for him for the said bank, and as security for the indebtedness above mentioned, the southwest quarter of the northwest quarter and the north half of the southwest quarter and the southeast quarter, and the southeast quarter of the southwest quarter of section 28, in township 156, range 72; that on the 11th day of December, 1905, Theo. P. Scotland executed and delivered to the Merchants Bank of Rugby a promissory note for \$1,600 with interest at 12 per cent per annum before and after maturity, payable on demand; that no part of this note has been paid except the sum of \$1,000, and on or about December 28, 1905, the interest thereon after the 11th day of August, 1907; that on the 15th

day of December, 1906, the said Theo. P. Scotland also executed and delivered to the said Merchants Bank another promissory note for \$2,941.15 with interest at the rate of 12 per cent per annum before and after maturity; that no part of said note has been paid except the interest has been paid thereon until the 15th day of November, 1908, and the sum of \$328.03 paid on or about April 17, 1909, and the sum of \$441.15 paid on or about the 7th day of November, 1907; that on or about the 15th day of November, 1906, Theo. P. Scotland & Company executed and delivered to the said Merchants Bank a promissory note for \$2,429.55, with interest at 12 per cent before and after maturity; that no part of said note has been paid except the interest thereon before and until the 1st day of December, 1908, and the sum of \$328 paid on or about the 17th day of April, 1909; that on the 8th day of January, 1907, Theo. P. Scotland and Clara M. Scotland, his wife, executed and delivered to the plaintiff E. R. Reitsch three promissory notes for \$1,000 each, and which sum they agreed to pay on January 15, 1905, March 1, 1908, and March 15, 1908, respectively, with interest at 12 per cent before and after maturity; but no part of said notes has been paid. That on the 8th day of January, 1907, and for the purpose of securing the said notes to the said Reitsch, the said Theo. P. Scotland and Clara M. Scotland, his wife, executed a mortgage to the said Reitsch on the three pieces of land hereinbefore described and owned by them.

The reply then goes on to state that thereafter and during the year 1907, Theo. P. Scotland and Theo. P. Scotland & Company transferred and assigned and set over to the defendant, John McCarty, all of their property, both real and personal, including the real property described in the complaint, in trust, however, for the benefit of the creditors of the said Theo. P. Scotland and Theo. P. Scotland & Company, it being understood and agreed that the said McCarty should, from the moneys received by him from the said property, pay mortgages, liens, and encumbrances, and, after the creditors of the said Scotland and the said Scotland & Company have been paid, surrender and deliver up to the said Scotland and Scotland & Company the balance of said property, but thereafter and in the year 1907 the said Clara M. Scotland, for the same purpose and "in consideration that said John McCarty advance

any money necessary to effect said purposes," assigned and set over to him her property, both real and personal.

The reply then alleges that at the time of the execution by the plaintiff McClintock of his mortgage to the Merchants Bank on the southeast quarter of the southeast quarter and lot 5, of section 30, and lots 1 and 2, of section 31, in township 156, north of range 72, he was not the owner in fee of said premises, but held the same in trust for the payment of the debts of the said Scotland, and it was understood and agreed that Theo. P. Scotland should assume said mortgage and pay it.

It then alleges that on or about the 22d day of January, 1909, Theo. P. Scotland, individually, and as secretary and treasurer of the Theo. P. Scotland & Company, made redemption for himself and for said company by paying to the Merchants Bank of Rugby all sums due, but that the said Theo. P. Scotland *fraudulently and with intent to hinder and delay the plaintiffs*, and to defraud them in the collection of the above-described claims and mortgages, procured the said Merchants Bank of Rugby, in place of certificates of redemption, to execute and deliver to him assignments of said sheriff's certificates of sale, and being the assignments set forth in the defendants' counterclaim, and, fraudulently and with intent to hinder and delay the plaintiffs *and defraud them in the collection of their claims and mortgages, procured said Merchants Bank to execute and deliver the said assignments in blank and without the name of the assignee therein, and thereafter, and without the knowledge or consent of the said Merchants Bank*, and with intent to hinder and delay the plaintiffs and defraud them in the collection of their claims and mortgages on said property, and with the full notice and knowledge of the defendant, *filled in and inserted in the said assignments the name of the defendant, John McCarty*, and delivered the same to said defendant without consideration therefor, or, if any consideration passed therefor, it was that the defendant advanced and loaned to Theo. P. Scotland and Theo. P. Scotland & Company the sum necessary to make redemption from said foreclosure sales, which sum or sums Theo. P. Scotland and Theo. P. Scotland & Company promised and agreed to pay to the defendant, and that it was upon these certificates so fraudulently signed that the sheriff's deeds were obtained.

The plaintiffs in their reply "then pray that the said assignments, deeds, and conveyances to the defendant McCarty be in all things ad-

judged fraudulent, null, and void as to these plaintiffs, Reitsch and McClintock, and subsequent and subject to the claims and liens, mortgages, and encumbrances of the plaintiffs herein, or in the event the court so finds that the said assignments and deeds be adjudged and decreed to be held by the defendant to secure the payment of the redemption money advanced by the said defendant to Theodore P. Scotland and Theo. P. Scotland & Company and be adjudged to be a mortgage and lien upon the said premises for the amount of redemption money advanced by the defendant, if any, and interest, and plaintiffs be adjudged and decreed to have the right to redeem therefrom on the payment of said money paid to redeem said premises from foreclosure; and that the defendant be adjudged and decreed to hold the said premises in trust for said Theo. P. Scotland and Theo. P. Scotland & Company, and that the same be adjudged and decreed in all things to be subject to the lien and encumbrances and mortgages of the plaintiffs."

The trial court found the facts for the plaintiffs and respondents practically as they were set forth in the reply, and entered judgment decreeing that the said assignments and sheriff's deeds were merely subject to the redemption money paid therefor and which it held and decreed to have been advanced by the defendant, McCarty, to Theo. P. Scotland and Theo. P. Scotland & Company, but otherwise to be the property of the said Theo. P. Scotland and Theo. P. Scotland & Company and subject to the liens of the plaintiffs. From this judgment defendant has appealed and asked for a trial *de novo*.

Albert E. Cogger and F. T. Cuthbert, for appellant.

In the matter of pleadings, the legislature did not intend to eliminate the necessity of a reply to a counterclaim against plaintiff. Comp. Laws, §§ 7526, 7527, 8521.

Plaintiffs are now clearly estopped to reverse their position as to the reply being a proper pleading in this case. *Sullivan v. Traders' Ina. Co.* 169 N. Y. 213, 62 N. E. 147.

The general rule is that parties are bound by, and estopped to controvert, allegations or admissions in their own pleadings. 31 Cyc. 87; *Myrick v. Bill*, 3 Dak. 284, 17 N. W. 268.

Nor can a party obtain relief on a different theory from that upon which his pleading rests. 21 Enc. Pl. & Pr. 649, 650.

The provision of the instrument of assignment relating to the transfer of all property did not operate of itself to transfer real property. There was no actual transfer, and the assignment itself was invalid. *MacLaren v. Kramar*, 26 N. D. 244, 50 L.R.A.(N.S.) 714, 144 N. W. 85; 2 R. C. L. 680.

Where the assignment of a sheriff's certificate is unambiguous, the court will give it effect according to the natural and obvious meaning of the language employed, and parol evidence is inadmissible to vary its terms. *Behr v. Gerson*, 95 Ala. 438, 11 So. 115; *Flynn v. Butler*, 189 Mass. 377, 75 N. E. 730; *Dunbar v. Montreal River Lumber Co.* 127 Wis. 130, 106 N. W. 389; *Thomas v. Board of Education*, 81 N. J. Eq. 186, 86 Atl. 412; *Weed v. Jewett*, 2 Met. 608, 37 Am. Dec. 115; *Hennessy v. Griggs*, 1 N. D. 52, 44 N. W. 1010; *Northwest Fuel Co. v. Bruns*, 1 N. D. 137, 45 N. W. 699; *National German American Bank v. Lang*, 2 N. D. 66, 49 N. W. 414; *Edwards & McC. Lumber Co. v. Baker*, 2 N. D. 292, 50 N. W. 718; *Plano Mfg. Co. v. Root*, 3 N. D. 165, 54 N. W. 924; *Hutchinson v. Cleary*, 3 N. D. 270, 55 N. W. 729; *William Deering & Co. v. Russell*, 5 N. D. 319, 65 N. W. 691; *Fletcher Bros. v. Nelson*, 6 N. D. 94, 69 N. W. 53; *Foster v. Furlong*, 8 N. D. 282, 78 N. W. 986; *Reeves v. Bruening*, 13 N. D. 157, 100 N. W. 241; *Alsterberg v. Bennett*, 14 N. D. 596, 106 N. W. 49; *Howe v. Walker*, 4 Gray, 318; *Rieck v. Daigle*, 17 N. D. 365, 117 N. W. 346; *American Nat. Bank v. Lundy*, 21 N. D. 167, 129 N. W. 99; *McCulloch v. Bauer*, 24 N. D. 109, 139 N. W. 318; *Cughan v. Larson*, 13 N. D. 373, 100 N. W. 1088; *Gilbert v. Moline Plough Co.* 119 U. S. 492, 30 L. ed. 476, 7 Sup. Ct. Rep. 305, 3 Dak. 239, 15 N. W. 1; *Hardwick v. McClurg*, 16 Colo. App. 354, 65 Pac. 405, 21 Mor. Min. Rep. 412; *State ex rel. Yeoman v. Hoshaw*, 98 Mo. 358, 11 S. W. 759; *Tyler v. Giesler*, 85 Mo. App. 278; *Enright v. Franklin Pub. Co.* 24 Misc. 180, 52 N. Y. Supp. 704; *Newman v. Blum*, — Tex. —, 9 S. W. 178; *Ætna Iron Works v. Owen*, 62 Ill. App. 603; *Brown v. O'Byrne*, 153 Ala. 621, 127 Am. St. Rep. 77, 45 So. 129; *Furculi v. Bittner*, 60 Misc. 112, 125 N. Y. Supp. 36; *Southern School Book Depository v. Holmes*, 104 Miss. 736, 61 So. 698; *Re Bird*, 180 Fed. 229; *Mulrooney v. Royal Ins. Co.* 157 Fed. 598; *Albert v. Albert*, 12 Cal. App. 268, 107 Pac. 156; *Pollard v. Sayre*, 45 Colo. 195, 98 Pac. 816; *Flynn v. Butler*, 189 Mass. 377, 75 N. E. 730; *Kasal v. Hlinka*, 35 N. D.—36.

118 Minn. 37, 136 N. W. 569; Janvey v. Loketz, 122 App. Div. 411, 106 N. Y. Supp. 690.

A conveyance to secure an honest debt is not fraudulent. Paulson v. Ward, 4 N. D. 100, 58 N. W. 792; Comp. Laws 1913, § 7220.

The contract viewed as a general assignment is void. MacLaren v. Kramar, 26 N. D. 244, 50 L.R.A.(N.S.) 714, 144 N. W. 85; Cutler v. Pollock, 4 N. D. 210, 25 L.R.A. 377, 50 Am. St. Rep. 644, 59 N. W. 1062; 2 R. C. L. 690.

"It is not every conveyance that has the effect of delaying or hindering creditors, that is, in itself, fraudulent. In some degree it is the effect of every assignment of a debtor's property for the benefit of his creditors, to produce hindrance and delay. United States v. Bank of United States, 8 Rob. (La.) 402; Farmers Bank v. Douglass, 11 Smedes & M. 539; Hafner v. Irwin, 23 N. C. (1 Ired. L.) 490; Hempstead v. Johnston, 18 Ark. 123, 65 Am. Dec. 458.

"It is the settled rule that, in the absence of statutes forbidding preferences, every debtor has the right to prefer one or more of his creditors to the rest, and he may do this in an assignment for the benefit of creditors as freely as in any other way." 2 R. C. L. 44.

When trustees act honestly and legally proper, they receive the favor and protection of the court. The legal presumption always is that a trustee has faithfully executed his trust, unless the contrary is fully and clearly proved. Burrill, Assignm. 6th ed. p. 568; Valentine v. Decker, 43 Mo. 583; Jefferis's Appeal, 33 Pa. 39; 1 Am. Lead. Cas. (Hare & W.) 303, notes; McLaughlin v. Park City Bank, 22 Utah, 473, 54 L.R.A. 343, 63 Pac. 589.

This is not a case of purchasing trust property. But even if it were, there is no showing to affect the actions of the so-called trustee, or the property, and the plaintiffs are in no position to raise such question.

The right to question such a purchase and have it set aside belongs only to the *cestuis que trust*, the trustee himself, creditors, and third persons generally, possess no such right. 39 Cyc. 369, 370.

That a trustee, under an extinguished trust, is not bound by its dissolved ties, is clear. 39 Cyc. 189; Pico v. Warner, 73 Cal. 17, 14 Pac. 377; Civil Code (Cal.) §§ 2279, 2282; 20 Cyc. 416.

"Equity will not aid avarice in purloining property." Anthes v. Schroeder, 3 Neb. (Unof.) 604, 92 N. W. 196; Curtis v. Price, 12 Ves.

Jr. 103, 33 Eng. Reprint, 35, 8 Revised Rep. 303; May, Fraud, Conv. 689; Story, Eq. Jur. 12th ed. 371, 381; Bradley v. Snyder, 14 Ill. 263; Richardson v. Welch, 47 Mich. 309, 11 N. W. 172; Bradley v. Larkin, 5 Kan. App. 11, 47 Pac. 315; Veeder v. Veeder, 141 Iowa, 495, 120 N. W. 61; Williams v. Nierenberg, — N. D. —, 115 N. W. 510.

The debtor is an indispensable party to a suit to set aside a fraudulent conveyance. 5 Enc. Pl. & Pr. 539-541.

"A trustee, who is also a large creditor, has the right to purchase for himself at a forced foreclosure sale." Leavell v. Leavell, 4 Ky. L. Rep. 889.

Even though a person has the right to redeem from a foreclosure sale, yet he may not be under any obligation to do so for his own protection; and if he pays the proper sum to the purchaser and receives an assignment in the due and usual form, it is not a redemption, but a purchase of the rights and title of the purchaser at foreclosure sale. 27 Cyc. 1866; McRoberts v. Conover, 71 Ill. 524; Comp. Laws 1913, § 7222.

An act which does not in any way obstruct creditors in the enforcement of their legal rights cannot be said to be fraudulent. Stevens v. Meyers, 14 N. D. 398, 104 N. W. 529; 4 Cyc. 219.

In general, a debtor's property may be reached by creditors, but not his talents or industry. He cannot be compelled to labor for the benefit of his creditors, and therefore they are not defrauded, and cannot complain if he donates his labor or services to another. 20 Cyc. 358; Voorhees v. Bonesteel, 16 Wall. 16, 21 L. ed. 268; Abbey v. Deyo, 44 N. Y. 343.

"A bill to reach a judgment debtor's assets which have been fraudulently conveyed will not lie until the creditor has exhausted his remedy at law to every available extent, and has secured a return of his execution *nulla bona*. Case v. Beauregard (Case v. New Orleans & C. R. Co.) 101 U. S. 688, 25 L. ed. 1004; Schofield v. Ute Coal & Coke Co. 92 Fed. 269; 2 Moore, Fraud. Conv. p. 771; Jones v. Green, 1 Wall. 331, 17 L. ed. 554; National Tube Works Co. v. Ballou, 146 U. S. 517, 36 L. ed. 1070, 13 Sup. Ct. Rep. 165; Taylor v. Bowker, 111 U. S. 110, 28 L. ed. 368, 4 Sup. Ct. Rep. 397.

The plaintiffs are estopped to attack the foreclosure sale for the reason that they received and accepted the purchase money. Moore, Fraud.

Conv. chaps. 3, 5, §§ 8, 20, pp. 83, 212; 20 Cyc. 434; 14 Am. & Eng. Enc. Law, 281; Lemay v. Bibeau, 2 Minn. 291, Gil. 251; Heaton v. Ainley, — Iowa, —, 74 N. W. 766.

The proof of fraud in any case must be clear and satisfactory. Graham v. Graham, 184 Mich. 638, 151 N. W. 596, 20 Cyc. 121; Kvello v. Taylor, 5 N. D. 76, 63 N. W. 889.

Paul Campbell, for respondent.

The title here is held in trust by the defendant for our grantors—mortgagors. By defendant coming in and answering, claiming title, in an action to determine adverse claims, he becomes the plaintiff and takes the burden of proof. Walton v. Perkins, 28 Minn. 413, 10 N. W. 424.

An unnecessary pleading is mere surplusage. A voluntary reply should be disregarded. 21 Enc. Pl. & Pr. 281, d; 18 Enc. Pl. & Pr. 693, note 1, 723c; Gull River Lumber Co. v. Keefe, 6 Dak. 160, 41 N. W. 743.

Fraud, where it exists, is always in issue, even without a pleading, where the party has not had opportunity to plead it. 9 Enc. Pl. & Pr. 684, 685; Jackson v. Brown, 76 Hun, 41; Lyon v. Plankinton, 15 S. D. 400, 89 N. W. 1018.

Like, where the only clear and convincing proof is peculiarly in the knowledge and power of the defendant and his fraudulent grantor. 2 Am. & Eng. Law, 487 (2), 489, note 6, 490 (d), 491 (c), 492, 493, 498 (4) (a), 499 (c), 499 (b), 500, 502 (d), 506, 4 a (1), 507, 510, 512 (b) 516 (3) (a), 519 (c), 522 (4), 524 (6), 526 (10); 1 Sutherland, p. 743, note 111; 4 Sutherland, p. 3736, note 284.

It is true that absence of evidence and the explanation on the part of the defendant, in whose knowledge alone certain facts existed, was considered by the court, and properly so. 20 Cyc. 346, 4, 450, 10, 763, N.

All the actions of a party to the transaction, where fraud is claimed, in connection therewith, are open to investigation and examination. 20 Cyc. 450, 769-771.

Concealment of the termination of a trusteeship is as much a fraud and raises an estoppel the same as actual false representations. 11 Am. & Eng. Enc. Law, 2d ed. 427; 28 Am. & Eng. Enc. Law, 2d ed. 899, F, 951, B, 952, 953, 976.

Where money is advanced for the benefit of others and to protect

their properties and secure the repayment of the advancement, and such is the agreement its violation raises a resulting trust. 15 Am. & Eng. Enc. Law, 2d ed. 1138, 1147, 1149, 1187.

An attempted resignation of a trustee, not accepted, will not terminate the trust. 39 Cyc. 92, and 99.

Fraud and estoppel may arise from the statements, representations, and promises of the opposite party, without a pleading of them. 20 Cyc. 453, 751, 763.

Parol evidence is not admissible to contradict or vary written contracts. But the rule never applies in cases of fraud, estoppel, fraudulent concealment, or mistake. *Miller v. Smith*, 20 N. D. 96, 126 N. W. 499; *Johnson v. Kindred State Bank*, 12 N. D. 336, 96 N. W. 588; *First State Bank v. Kelly*, 30 N. D. 84, 152 N. W. 125; *Grebe v. Swords*, 28 N. D. 330, 149 N. W. 126; *Putnam v. Prouty*, 24 N. D. 517, 140 N. W. 93; *Jasper v. Hazen*, 1 N. D. 75, 44 N. W. 1018.

As trustee, McCarty became and was the successor in interest of the mortgagor, and he became the owner of the property. As such owner he could not take assignments. 27 Cyc. 1329, 1332.

Creditors are not necessary parties to an action to avoid fraudulent conveyances brought by mortgage creditors. 20 Cyc. 655 to 680, 697, 704, 711 to 714; *Comp. Laws 1913*, §§ 7404, 7406, 7442, 7447; *Lyon v. Plankinton*, *supra*.

A deed as security is not necessarily a fraud on creditors; it becomes such where, as in this case, it is untruthfully claimed as not such a transaction, but an absolute conveyance. 20 Cyc. 434, 435, 736, 737, 740, 769, 771, 782; 8 Cyc. 632, 647, 648, 674.

The rule of clear and satisfactory proof has no place or application here. 20 Cyc. 439 to 453, 750, 751, 763, 780; 27 Cyc. 991 to 1028; *Smith v. Huff*, 23 N. D. 37, 135 N. W. 772, *Ann. Cas.* 1914C, 1072; *Adams v. McIntyre*, 22 N. D. 337, 133 N. W. 915; *Miller v. Smith*, 20 N. D. 96, 126 N. W. 499; *Omlie v. O'Toole*, 16 N. D. 126, 112 N. W. 677; *Forester v. Van Auken*, 12 N. D. 175, 96 N. W. 301; *Northwestern F. & M. Ins. Co. v. Lough*, 13 N. D. 601, 102 N. W. 160; *Wells v. Geyer*, 12 N. D. 316, 96 N. W. 289; *Merchants State Bank v. Tufts*, 14 N. D. 238, 116 Am. St. Rep. 682, 103 N. W. 760; *Smith v. Jensen*, 16 N. D. 408, 114 N. W. 306; *Wadge v. Kittleson*, 12 N. D. 452, 97 N. W. 856.

There exist in this case mistake, fraud, concealment, and estoppel, and respondent had the right, on cross-examination, to go into such matters,—things peculiarly within the knowledge of defendant. 16 Cyc. 681, 759, 771, 801; 20 Cyc. 15, 20, 22–24, 41; 6 Cyc. 286.

BRUCE, J. (after stating the facts as above). This action, though nominally one to subject certain land to the lien of certain mortgages held by the plaintiffs, is really one to set aside and to declare null and void three sheriff's deeds. It is a case, therefore, where the proof should be clear and convincing. Though the briefs contain some 1,333 pages of printed matter and the record some 761, to say nothing of the exhibits which put in book form would fill a volume, the only real questions at issue are whether the certain sheriff's certificates under which these deeds were obtained were in fact purchased by said McCarty for himself or as trustee for the original owners of the land, Theo. P. Scotland & Theo. P. Scotland & Company, or for them and their creditors, including the plaintiffs.

The plaintiffs' theory of the case as first set forth in their brief was "that the said Theo. P. Scotland, fraudulently and with intent to delay the plaintiffs and defraud them in the collection of the above-described claims and mortgages, procured the said Merchants Bank of Rugby, North Dakota, in place of certificates of redemption, to execute and deliver to him assignments of said sheriff's certificates of sale, and fraudulently and with intent to hinder and delay the plaintiffs and defraud them in the collection of their claims and mortgages procured said Merchants Bank to execute and deliver the said assignments *in blank and without the name of the assignee therein*, and thereafter and without the knowledge or consent of the said Merchants Bank, and with intent to hinder and delay the plaintiffs and defraud them in the collection of their claims and mortgages on said property, and with the full knowledge of the defendant, filled in and inserted the name of the defendant, John McCarty, and delivered the same to the said defendant, without consideration therefor, or if any consideration passed therefor it was that the defendant advanced and loaned to Theo. P. Scotland and Theo. P. Scotland & Company the sum necessary to make redemption from said foreclosure sales, which sum or sums the said Scotland and Theo. P. Scotland & Company promised and agreed to pay to the defendant."

This allegation was contained in the reply, and the reply was verified by Paul Campbell, who was the attorney for the plaintiff and one of the principal witnesses of the plaintiff in the case. The assignments, however, were actually produced upon the trial, and when they were examined it was found that the name of John McCarty in one of them was in the handwriting of Paul Campbell, who at the time was attorney for the Merchants Bank of Rugby, and, as we have said, one of the principal witnesses in the present case, and who had verified the reply, and that in each of the other two assignments the name of John McCarty was in the handwriting of R. A. Warren, who was also one of the principal witnesses for the plaintiffs in the present case and who at that time was the assistant cashier, and, in the absence of Mr. McClintock, practically in control of the affairs of the Merchants Bank of Rugby.

Not only do these facts put an end to the claim of fraud on the part of McCarty in inserting his name in the assignments, but they naturally must lead us to doubt the memory of Paul Campbell and R. A. Warren as to the real transactions which were involved in this case, and to discredit the proof which plaintiffs have adduced at the trial, which the law requires to be clear and convincing. It is not necessary to say, and we do not say, that Mr. Campbell was dishonest in drawing the reply and making the verification. We do say, however, that there is in that reply and in that verification a clear proof of lack of remembrance and clarity of mind as to the real transactions.

After this proof failed, some other theory of the case was necessary, and two theories were advanced. The first was that McCarty was a trustee for the creditors of Scotland and Scotland & Company and for the plaintiffs, and that when he made the purchase he did so, not for himself, but as such trustee. The trouble with this theory is that there is nothing on which it can be based. Though the proof showed that there had been some kind of a trusteeship for some of the creditors, the plaintiffs were at no time parties to this agreement, and, even as to the parties interested, it had been repudiated and discontinued with the consent of all the parties prior to the assignment of the certificates.

The next theory is that the assignments were obtained by McCarty as a result of a conspiracy between him and Theo. P. Scotland and Clara Scotland, his wife, for the purpose of defrauding the creditors generally and especially the plaintiffs, and that McCarty lent to the Scot-

lands the money necessary to obtain the certificates. We find in the pleadings no allegation of this conspiracy, but merely that the defendant had made redemption for himself and Theo. P. Scotland & Company, and fraudulently inserted his own name into the blank certificates, and had loaned to Theo. P. Scotland and Theo. P. Scotland & Company the sums necessary to make the redemption.

Not only is this so, but the proof discloses that McCarty was himself a heavy creditor of the Scotlands. His claim was some \$6,500. Why, being such a creditor, he should loan to the Scotlands the sum of \$1,400 to redeem land which after such redemption would be subject to the mortgages of the plaintiffs, it is difficult to understand, and, although hundreds of pages of testimony are introduced in an attempt to show a conspiracy between McCarty and the Scotlands, we can hardly find the proof to be clear and convincing even upon this point. It is true it is urged that Scotland carried on the negotiations for the purchase of the certificates, but why should he not. He owed McCarty a large sum of money, and McCarty had befriended him in the past, and why should he not obtain his aid or employ him to do what he pleased? It is also true that a large number of transactions are gone into, and that as regards some of these matters the testimony is inconclusive. The transactions, however, cover long periods of years. No warning was given by the pleadings that they would be inquired into, and such evidence could hardly be other than confused and unsatisfactory. One of them is especially illustrative, and it is a contract dated February 13, 1909, which is as follows: "I have this day agreed to accept crop contract for the sale of the following land in favor of Clara M. Scotland described as follows: Southeast $\frac{1}{4}$ of sec. 5, T-156 R-72 price \$2,800 less 1,200 mortgage loan and lot 5 S. E. $\frac{1}{4}$ sec. 30 lot one and two sec. 31-T-156 R-72 price 3,000 less mortgage loan of 1,500 and E. $\frac{1}{2}$ S. W. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$ and N. W. $\frac{1}{2}$ S. W. $\frac{1}{4}$ sec. 28 T. 156 R 72 price 2,800 less mortgage 2,000 and I hereby agree if the Mackey deal is satisfactory as to title I will cancel *either one* of the above contracts and give deed subject to mortgage loan on same."

It is claimed that this contract covers some of the land in question, and that in it McCarty agreed to sell to Clara M. Scotland all of the land covered by the agreement for an insignificant price (some \$1,500) which was involved in the Mackey deal, and this claim is based upon

the affidavit of Paul Campbell that the contract was tampered with after it had been introduced in evidence on the trial; that when introduced in evidence on the trial it read, "I will cancel *every* one of the above contracts and give deed subject to mortgage loan on same," and that after said trial it was changed to, "I will cancel *either* one of the above contracts and give deed subject to mortgage loan on same."

The record disclosed that in copying the exhibit the stenographer had used the word "every" instead of "either," and that the learned trial judge in deciding the case decided it on the transcript as furnished to him. We have, however, the original exhibit before us. It undoubtedly contains the word "either," and not "every." It is clear to us that some word was first written under the word "either," but it is also clear from an examination of the exhibit under the microscope that the word "either" was written at the same time as the rest of the contract, in the same handwriting and with the same pencil, and that though some other word seems first to have been written and to have been erased, and the word "either" written over it, that first word could not possibly have been "every." The contract indeed was introduced by the plaintiff, and there is no proof whatever that after its introduction any change was made.

When we take into consideration the fact that the defendant McCarty was a heavy creditor of the Scotlands, and that the title to the land, even though subject to other mortgages, would be a benefit to him in other litigation, and that the bank was already heavily secured for all its advances, we can see nothing unreasonable or fraudulent in McCarty purchasing the certificates, and we must come down to the main question, and that is, whether when the certificates were given to McCarty and the name "McCarty" without the designation "trustee" was inserted therein by the attorney and the assistant cashier of the bank, it was in fact intended that the sale should be made to McCarty as a trustee, and not as a purchaser in his own name. In considering this matter we must remember that the Scotlands are not complaining, and that we have here an attempt by parol evidence to set aside a solemn written instrument. There is no question that the checks were signed by McCarty individually and on his own funds, and that as trustee he had no funds in the bank at all. There is no ambiguity about the assignments. No matter what may have been the rights of the Scotlands, it

is hardly in the mouths of the plaintiffs to dispute their plain words. See *Behr v. Gerson*, 95 Ala. 438, 11 So. 115; *Flynn v. Butler*, 189 Mass. 377, 75 N. E. 730; *Thomas v. Board of Education*, 81 N. J. Eq. 186, 86 Atl. 412.

The attempt of plaintiffs was to prove that the assignments of the sheriff's certificates were merely intended to be certificates of redemption, and we hardly think that such proof was admissible. Even, however, if we take plaintiffs' testimony at its best, it is hardly convincing when opposed to that of the defendant McCarty.

On behalf of plaintiffs the witness Warren testified: "I signed exhibit 'd.'" I do not remember the occasion and nothing about the circumstances.

Q. I will also ask you to examine exhibits 14, 17, and 15 together with exhibit 48, and state whether or not those instruments bear your signature?

A. They do, they were signed by me on behalf of the bank. I remember the transaction. The transaction was conducted on behalf of McCarty by Theo. P. Scotland. McCarty was not present. I remember Scotland came to the bank and spoke about taking these up, and if I remember right we didn't have *any assignment of sheriff's certificate* and he went out again to get some. I think he came back again in the afternoon between 2 and 3 o'clock, and we sat down at the table and he wrote these out.

Q. What was said between you and Scotland with reference to these matters?

A. Why he talked about taking—he talked about taking up the assignments or *getting assignments of these sheriff's certificates*, and he told me *that they were for John McCarty to put in John McCarty's name*, or that John McCarty was loaning him the money to take them up.

Q. Told you that John McCarty was loaning him the money to take these up?

A. Him the money to take these up.

Q. What did Scotland say with reference to taking these sheriff's certificates up?

A. The matter was talked over, *I do not remember*.

Q. Was the time about up within which redemption could be made?

A. I think so.

Q. Did he at that time make a remark to you that these matters had to be taken up?

A. I do not remember as he said the words they had to be taken up, but he said he was going to take them up.

Q. Did he say anything else with reference to the matter?

A. I think the words were used, he said, in place of mentioning McCarty's name, he said John is letting me have the money.

Q. Any conversation between you about or with reference to the assignment to McCarty instead of redeeming through the sheriff?

A. Yes, sir. In regard to putting in McCarty's name he said it wouldn't make any difference so far as *our security* was concerned.

Q. They had taken up the interest coupons before that time had they?

A. Yes, sir.

Q. And had made redemption of foreclosure on the premises of Scotland and Scotland & Company?

A. Yes, sir.

Q. And in those prior assignments and instruments executed and delivered to John McCarty, how was he usually designated?

A. You mean his name inserted?

A. Yes, sir.

A. John McCarty.

Q. It had not been, and was not, your usual custom and practice, was it, to insert the word "trustee" following that?

A. No.

Q. Have you at any time prior to the commencement of this action, on or about May 18, 1909, had any notice of knowledge that John McCarty's trusteeship had terminated?

A. I did not.

Q. Did either he or Scotland or had anybody at any time prior to that time communicate to you or tell you of the termination thereof.

A. No.

Q. Did Scotland or McCarty in any manner, at any time, intimate to you that these sheriff's certificates were being purchased by John McCarty individually, and not as trustee?

A. He did not.

Q. Did he in that conversation with you out of which these assignments arose say in substance and effect that John McCarty wanted to buy those certificates?

A. No. It was quite a long conversation. We talked, I suppose, all the time we were writing, but I remember distinctly he said he was getting the money from John to take them up.

The testimony of the witness Campbell is also too improbable to be clear and convincing to us. He first says in his sworn reply that the assignments were left in blank, and that McCarty fraudulently inserted his name therein. Mr. Campbell was a lawyer and Warren was an experienced business man. Why did they leave the name of the assignee in blank? Both of them knew the effect of an assignment. If they thought John McCarty was trustee and the redemption was made by him as trustee, why did they not insert the name and the word "trustee" attached to it? The Merchants Bank had foreclosed four mortgages. They held four sheriff's certificates which were within a week of maturity. The bank would have been entitled to four sheriff's deeds, but in spite of this fact Mr. McCarty's individual checks for about \$1,300 are delivered to the bank, and in return for them the bank delivers assignments of the certificates executed to McCarty and McCarty alone. Mr. Campbell says that Scotland represented that the checks were to effect redemption. If they were, why did he, an experienced lawyer, not deliver certificates of redemption to McCarty as trustee? There were four assignments delivered at the same time, but no attempt is made to declare the fourth to be a certificate of redemption, as evidently the purchase price was sufficient. There were at the time of the purchase by McCarty approximately \$6,000 of prior encumbrances against the three quarters which McCarty assumed when he took title. To put it in a different way, the land was worth about \$12,000. The plaintiffs claim a \$10,000 lien inferior to \$6,000 of prior mortgages, which, with the \$1,300 paid for the certificates, makes \$17,300. If then McCarty had advanced the \$1,300 as a redemption fund he would have received no benefit himself, nor would the other creditors of the estate, nor would the Scotlands, nor would anybody except the Merchants Bank and their officers. It is perfectly clear that at that time the bank had a large amount of other collateral security, and which appeared amply

sufficient to secure all of the debts owing to it by the Scotlands. Is it not more probable that they preferred liquidating some of their claims and taking \$1,300 in cash, rather than to keep the lands which were then only estimated to be worth \$12,000 with an encumbrance against them of \$6,000, than that McCarty should have advanced to the Scotlands, who already owed him a large sum of money, \$1,300, to effect a redemption which would benefit no one except the plaintiff bank.

Where indeed is the fraud in this case and what fraudulent representations were relied upon? The evidence of the witness Warren is totally unreliable, for it is inconsistent with the verified reply which must have been drawn in reliance upon his memory and version of the affair, together with that of attorney Campbell, and which is equally subject to criticism.

Even this testimony, however, falls far short of establishing fraud. The bank cashier Warren was not mislead. He knew what he was doing. He was no child, but an experienced business man. He knew the difference between a certificate of redemption and an assignment of a sheriff's certificate. He himself testified that they had no assignments on hand, and that they held up the transaction until they could get some. He knew that the certificate would soon ripen into a sheriff's deed. He represented the bank, but he knew that, after the assignment and in the days that elapsed between its making and the time when redemption could be cut off by the issuance of a sheriff's deed, the plaintiffs could redeem therefrom and the other creditors could redeem from the plaintiffs.

All he says, however, is that Scotland told him that he wanted to redeem, and that McCarty said he would loan him the money, but that Scotland told him to make the assignment of the sheriff's certificate to McCarty and McCarty alone. The check was McCarty's check, and on his own individual deposit, and the bank cashier was cognizant of this fact. He gave the assignment to McCarty individually with his eyes wide open. Where was there any fraud or anything that is inconsistent with McCarty, who was already a heavy creditor, taking an assignment as additional security for his heavy claims and to protect him in pending litigation, and even agreeing, if that was the fact, that when these debts were paid he would reconvey the land to the Scotlands?

Unless he was still trustee under the trust deed, there was nothing at all improper in this transaction.

Plaintiffs' counsel in fact seems to realize this fact, so together with the claim that McCarty purchased as trustee for the Scotlands he also, by leading questions, obtained testimony to the effect that Warren believed McCarty was purchasing not for Scotland, or for himself, but as trustee for the creditors, and this under the trust arrangement to which we have shown the plaintiffs were not parties, and which in fact had been repudiated by even those creditors who had been parties thereto. Yet, with all his business experience, the cashier did not insert the word "trustee" in the assignment which he executed, and, even if he had, it was a conveyance to these creditors under a trust deed to which the plaintiffs were not parties. If, therefore, there was a fraud, it was a fraud in which the plaintiffs by their agent fully participated. They received the purchase price, that is to say, the benefit of the transaction.

"Where it is shown that a complainant in a bill to set aside a fraudulent conveyance participated in or instigated such conveyance, the court will as a general rule leave him in the position which he was instrumental in creating, and will hold that he is estopped by his conduct from attacking the conveyance. The general rule is that a creditor who, with knowledge of the transaction, receives a benefit under a conveyance fraudulent as to creditors, thereby elects to affirm it, and is estopped from questioning its validity." 20 Cyc. 434. The creditor must not have participated in or assented to the conveyance of which he complains, for if he has he cannot afterwards be heard to assert that the transfer was fraudulent *per se* as to him. 14 Am. & Eng. Enc. Law, 281.

"There can be no doubt," says the supreme court of Minnesota in the case of *Lemay v. Bibeau*, 2 Minn. 291, Gil. 251, "but that a conveyance of real estate in due form, even if made with the intent to defraud creditors, is good as between the parties and privies, and can only be avoided by creditor of the fraudulent grantor . . . and the creditor may have his election either to confirm the conveyance or attempt to avoid it but he cannot do both. He cannot receive a benefit under the conveyance and then turn around and claim that the conveyance is fraudulent and void; and it is held that by receiving a benefit under

the conveyance claimed to be fraudulent he thereby affirms it so as to be estopped from setting up fraud or other facts in avoidance of it. He cannot hold on to such part of the contract as may be desirable on his part and avoid the residue, but must rescind *in toto*, if at all, and the party who would disaffirm a fraudulent contract must return whatever he has received upon it."

The form of the proceedings in this case is worthy of notice. The plaintiffs at no time brought an action to or attempted to rescind the conveyances or the assignments of the certificates. Nor did they at any time offer to pay back the \$1,300 which they had received from McCarty. Not only this, but they seek to set aside a solemn conveyance. They allege fraud, and in such cases proof must be clear and convincing and fraud must be proved by facts which are inconsistent with an honest purpose. *Graham v. Graham*, 184 Mich. 638, 151 N. W. 596; 20 Cyc. 121; *Kvello v. Taylor*, 5 N. D. 76, 63 N. W. 889.

That proof, however, is entirely contradictory within itself. They first say and swear that the assignments were made in blank and the name of McCarty was fraudulently inserted by the defendant. The proof shows that they wrote in the name of McCarty themselves. They then rely upon the proposition that McCarty was still trustee under the trust deed, yet they were not parties to this trust deed, and it had been repudiated by those who were. And in addition to that their agents, a lawyer and an experienced bank cashier, filled out the assignments and didn't mention the fact of the trusteeship at all. Confronted by these facts they then seek to prove a fraudulent conspiracy on the part of the Scotlands and the defendant. There is, however, no allegation of such conspiracy either in the complaint or in the reply, and there is no satisfactory proof of it.

The judgment of the District Court is reversed, and the cause remanded, with directions to enter judgment dismissing the complaint and reply and quieting the title to the premises in the defendant as against the claims of the plaintiffs and each of them. The costs and disbursements will be taxed against the plaintiffs.

CHRISTIANSON, J., being disqualified the HONORABLE JAMES M. HANLEY, Judge of the Twelfth Judicial District, sat in his place.

MRS. HOMER STEVENSON v. ROLAND MAGILL.

(L.R.A. —, —, 180 N. W. 700.)

Farm laborer's lien — foreclosure of — action for — cooking in cook car — threshing — validity of lien — class of labor — title to machine.

1. Plaintiff seeks to foreclose her farm laborer's lien for labor performed by her in cooking in a cook-car for a threshing crew while threshing Magill's grain in September and October, 1915. Defendant claims a sale of the threshing rig to another, who hired plaintiff and the threshing crew, and denies responsibility. He also asserts that a farm laborer's lien cannot be claimed for work of the kind performed. From a judgment of dismissal plaintiff appeals, demanding trial *de novo*.

Held: Under the facts title to the threshing machine is not shown to have passed to the third party, who is held to be either an agent or partner of defendant and engaged with him in a joint venture of threshing defendant's grain. That defendant should be held liable for payment of plaintiff's wages.

Farm laborer's lien — work in cooking — cook car — threshing crew — crops.

2. Plaintiff is entitled to a farm laborer's lien, her work contributing directly to threshing of the crop. The case is not governed by *Lowe v. Abrahamson*, 18 N. D. 182.

Opinion filed November 25, 1916. Rehearing denied December 30, 1916.

Judgment for foreclosure directed.

Appeal from District Court of Ransom County, *Allen*, Judge, dismissing this action.

Reversed and judgment ordered for plaintiff.

J. V. Backlund, for appellant.

The object of the statute in question is to secure workers in their rightful wages, and such statutes are liberally construed. *Sutherland*, Stat. Constr. § 409; *Lowe v. Abrahamson*, 18 N. D. 182, 19 L.R.A. (N.S.) 1039, 119 N. W. 241, 20 Ann. Cas. 355; *Heddan v. Walden Farmers Elevator Co.* 31 N. D. 392, 153 N. W. 1015.

A farm laborer is one who labors upon a farm in helping to raise the

NOTE.—On who is "farm" or "agricultural" laborer within a statute giving a lien for the wages of farm laborers, see note in 19 L.R.A. (N.S.) 1039, to *Lowe v. Abrahamson*, 18 N. D. 182, 119 N. W. 241, 20 Ann. Cas. 355, which case is referred to in the opinion above.

crops and doing other general farm work; one who does cooking in a cook car for a threshing crew while threshing the crop is a farm laborer within the meaning of the statute. *Lowe v. Abrahamson*, *supra*; *Seider's Appeal*, 46 Pa. 57; *Wentroth's Appeal*, 82 Pa. 469; *Wildner v. Ferguson*, 42 Minn. 112, 6 L.R.A. 338, 18 Am. St. Rep. 485, 43 N. W. 794.

All those who labor on the farm are engaged in one common purpose,—that of raising, securing, and governing the crops. *Farinholt v. Luckhard*, 90 Va. 936, 44 Am. St. Rep. 952, 21 S. E. 817; *Breault v. Archambault*, 64 Minn. 420, 58 Am. St. Rep. 545, 67 N. W. 348.

The further object of the statute is to protect all farm laborers and the interests of labor, and a sound public policy requires that it be liberally construed. *Breault v. Archambault*, *supra*; 2 C. J. 1006, 61; *Watson v. Auerbach*, 57 Ala. 353; *Parks v. Simpson*, 124 Ga. 523, 52 S. E. 616.

A joint adventure is an enterprise undertaken by several persons jointly. The contract need not be express, but may be implied from the conduct of the parties. *Knapp v. Hanley*, 108 Mo. App. 353, 83 S. W. 1005; 23 Cyc. 453, 462; 29 Century Dig. 8; *Still v. Holbrook*, 23 Hun, 517; *Clark v. Rumsey*, 52 N. Y. Supp. 417.

A. C. Lacy, for respondent.

The labor performed, in order to entitle one to a laborer's lien, must be strictly farm labor in, about, and upon the farm in raising or harvesting the crops, and such crops must be raised by the person for whom the work is done. Comp. Laws 1913, § 6857.

Working for a thresher in a cook car, cooking for his threshing crew, is not farm labor performed for the one who raises and harvests a crop. *Lowe v. Abrahamson*, 18 N. D. 182, 19 L.R.A.(N.S.) 1039, 119 N. W. 241, 20 Ann. Cas. 355; *Meade v. First Nat. Bank*, 24 N. D. 12, 138 N. W. 365.

Goss, J. This action is brought to foreclose a farm laborer's lien. Plaintiff, a woman, performed labor as a cook in a cook car in threshing Magill's grain in September and October, 1915. The trial court dismissed the case, from which judgment plaintiff appeals, demanding a trial *de novo*. The proof discloses that in the fall of 1915 Magill had about 20,000 bushels of grain to be threshed. He owned his own thresh-

ing rig. He entered into an indefinite oral understanding with one A. J. Kelly under which, to put it in Magill's own language, "Kelly was to have the machine when he completed threshing" for Magill. "There wasn't nothing expressly named in the amount of dollars, but he was to thresh my crop for the rig complete." The value of the rig is not stated. Magill said, in substance, that he wouldn't let Kelly move off the place until his threshing was done. Kelly assumed charge of the rig and moved it on Magill's farm with the cook car at Magill's buildings, where it remained. Kelly employed a crew, and, among them, the plaintiff as cook. Rainy weather prevented continuous work and from the 1st of September until the 6th of October, 1915, the period during which plaintiff cooked for the threshing outfit, only about 3,000 bushels of wheat and 4,000 bushels of oats were threshed. No threshing was done at any other place than Magill's. He advanced money to Kelly from time to time to pay for machine repairs, provision, and expenses, to an amount, he says, of about \$400. Magill's figures and account are wholly indefinite and unsatisfactory, being merely estimates. He refused to be specific and certain. Several of Magill's teams and men were working as a part of Kelly's crew, and Kelly was charged with their wages, Magill claims. Some ten days or two weeks before Kelly abandoned further performance of the alleged contract and threw up the deal, plaintiff told Magill to keep enough back to pay her wages, as he was paying Kelly money from time to time. She says: "I would like if you would hold out my wages. Kelly is drawing the wages and it isn't coming to the cook car. He goes to town and doesn't come back until it is all gone. I am working here every day, and I know the money all comes through you and I would like to have you to hold out my wages. And he says: "Sure, I will do that. You are the one that needs the money if anyone does, in preference to these hoboos who sit around here and play poker." The evidence is in dispute as to the amount of threshing that was done after this talk, but thereafter Magill paid Kelly at least \$70. On October 6th plaintiff quit for non-payment of her wages. Kelly then told plaintiff that Magill was taking the rig back and that he, Kelly, was not going ahead with the deal. Magill took the rig back, he says, and decided not to run the machine, but to hire his threshing done by another rig, and refused to provision the outfit. Plaintiff shortly afterwards filed her farm laborer lien,

claiming \$106.50 for thirty-five and one-half days' work at cooking for the outfit while they were threshing defendants' crop. It is admitted that there was no price per bushel fixed for whatever threshing was done or was to be done. It was understood that Magill would make some advances to Kelly, known by him to be without means. The lien was filed against both Kelly and Magill, and against the crop threshed, but Magill is sole defendant. He claims that he had sold the rig to Kelly, who had hired plaintiff, and that he was not responsible for her wages, and also that no farm laborer's lien is allowed by law for such services.

The proof fails to disclose that title to the rig ever parted from Magill, or that it was not the joint venture of Kelly and Magill. It is true that he testifies, in response to leading questions from his counsel, that he turned the rig over to Kelly and sold it to him and placed him in possession of it, and took it back eventually, but the circumstances are such as to require stronger proof than this of his parting with title. There was no written agreement, and it is indefinite as to whether title was to pass with the delivery of the possession or not until after all of Magill's threshing was done and his advances repaid, or when "the job was completed," as Magill first states was the fact, and which is more probable. Several rigs and teams were furnished by Magill, and he was to receive wages for them and was to receive this back after the threshing was done and Kelly had earned enough elsewhere to repay him, but it is admitted that the machine was not to leave Magill's farm until his threshing was done. It is also a circumstance that, as Magill states, no settlement was had when Kelly threw up the rig and he took it back. Everything was then left as indefinite as was the contract under which it was turned over, if at all, to Kelly in the first instance. To require less than certainty in the terms of the contract as to when the title passes, under such circumstances, would leave a situation such as to permit a party in Magill's position, by making an indefinite deal, to shirk responsibility for wages and expenses of his threshing upon any ne'er-do-well that he might see fit to ostensibly turn his rig over to. A lawsuit is the usual outcome of such a condition of affairs. On the other hand, from plaintiff's viewpoint, the judgment rendered was wholly inequitable and unjust, and amounts to little short of fraud upon her. Magill had knowledge that she was cooking for the crew, and that

her work was keeping the crew together all through the rainy weather and from the very first until the last day of her employment, as the cook car was at Magill's home and in his yard, and he must have known that she was cooking for the crew. Ten days or two weeks before the inevitable result came she had a talk with him, and he knew she was not getting her wages, and she says he promised to hold out enough money from Kelly to pay her, and evidently relying upon him she continued work. Under all the circumstances the fair inference is that Kelly was the agent or employee, or, at the most, virtually a partner of and with defendant Magill and for whose acts in employing this plaintiff, of which defendant had notice, defendant should be held responsible.

But it is claimed that under the authority of *Lowe v. Abrahamson*, 18 N. D. 182, 19 L.R.A.(N.S.) 1039, 119 N. W. 241, 20 Ann. Cas. 355, the plaintiff has not performed work for which she can claim a farm laborer's lien. This contention is fallacious. What was said in *Lowe v. Abrahamson* evidently lead the learned trial judge to adopt defendant's theory in dismissing this case. But that case went far from holding that a farm laborer's lien could not be claimed simply because the work was performed by a woman. There is no sufficient reason why, where a woman performs labor for which a man might claim a farm laborer's lien, a woman should not also have the right to claim a farm laborer's lien therefor. Had Magill employed a man to do the cooking on this rig, it could hardly be asserted that in law he would not have been entitled to a farm laborer's lien as security for his services rendered in procuring the threshing of the crop, under the holding in *Heddan v. Walden Farmers Elevator Co.* 31 N. D. 392, 153 N. W. 1015, to the same extent as the farm laborer who assisted in cutting the crop. *Lowe v. Abrahamson* merely holds that a woman doing ordinary housework on a farm is not a farm laborer within the meaning of the statute granting a lien for the wages of farm laborers. Certainly, the case should not be applied to facts such as are before us, because to do so would be the equivalent of denying a lien to a woman while under the same facts it would be granted to a man for the same work. The right to a lien does not, and should not, depend upon the sex of the individual who performed the work. If any person working upon this threshing rig was entitled to a lien, this plaintiff was. Her work contributed directly, not remotely, to the garnering of the crop raised upon this land, in feed-

ing the men who were threshing. In equity and good conscience she was entitled to a lien for, as well as to, her wages from defendant Magill, who should not be permitted to shift and juggle responsibility for, while enjoying the proceeds of, plaintiff's labor.

This holding but follows *Lowe v. Abrahamson*, *supra*. That decision carefully sets forth testimony to establish "the character of the work performed," quoting the opinion. It carefully distinguished that holding on facts from *Winslow v. Urquhart*, 39 Wis. 260, and *Breault v. Archambault*, 64 Minn. 420, 58 Am. St. Rep. 547, 67 N. W. 348, cited therein, wherein cooks for logging camps were held entitled to a lumberman's lien upon logs for services performed as lumbermen. In *Lowe v. Abrahamson* it is said: "In these cases [the logging crew cases] the cooks went into the logging camps as members of logging crews and did no other work except to cook for them. In this case the plaintiff did other work besides cooking, and cooked for others than the farm laborers." 18 N. D. p. 185. This plaintiff was, as in the logging cases, a member of the crew, doing no work but cooking for the crew. Engaged in farm labor only at threshing. Under the interpretation of *Lowe v. Abrahamson*, given in that opinion, that court would have held plaintiff entitled to a lien. If a cook at a lumber camp is entitled to a lien as a lumberman, a cook at a farm laborer's camp or cook car is likewise entitled to a farm laborer's lien as a farm laborer. See also *Young v. French*, 35 Wis. 111, holding, as interpreted in 39 Wis. 268: "One who cooks for the men at work on the logs directly is entitled to a lien thereon for his wages under the statute. . . . It seems to us that the person who cooks the food for the men who fall the trees and work directly and immediately upon the logs or timber performs service in the cutting, falling, driving, etc., such logs or timber within the meaning of the statute equally with those who use the ax, the saw, or the team to the same end. . . . The statute under consideration was enacted in the interests of labor, and a sound public policy requires that it be liberally construed. The construction contended for on behalf of the plaintiffs is too narrow, and, if adopted, would go far to defeat the objects and purposes of the statute." *Winslow v. Urquhart*, 39 Wis. 260-268. Our statute is also remedial and to protect the laborer, male or female, coming within its letter and spirit. In 64 Minn. 420, it is said: "It is evident that a cook or a blacksmith is as essential

to a logging crew as is the man who swings an ax or drives a team, and it is also evident that both perform manual labor. If the ax man or the teamster was compelled to leave his work and spend two hours of each day in preparing his own food, or in shoeing his horses, or repairing his sled or tools, would it be suggested that his time while so engaged should be deducted from his day's work, and a lien allowed for the balance only? We believe that no one would think of asserting such a proposition. And, if this be so, why should a person who renders these services, but performs no other, be declared outside of the statute, and thus deprived of a lien?" Our statute § 6857, Comp. Laws 1913, reads: "Any person who performs services for another in the capacity of a farm laborer . . . shall have a lien," etc. Plaintiff was working "in the capacity of a farm laborer."

But, to avoid any misunderstanding of or misapplication of this holding as precedent, it may be stated that a cook on a cook car for the ordinary thresher has no farm laborer's lien upon the grain threshed for others by said thresher, as the cook would not be considered as a farm laborer, but a laborer for the thresher, who as thresher is not a farm laborer under this statute, but one who instead has a thresher's lien for his protection. Nor would an ordinary housemaid or hired girl who, with her other duties, cooks for a threshing crew working for her employer, be a farm laborer within the lien statute. *Lowe v. Abrahamson*, 18 N. D. 182, 19 L.R.A.(N.S.) 1039, 119 N. W. 241, 20 Ann. Cas. 355. But a farmer owning and operating his own threshing machine may, in doing his own threshing, employ farm laborers who may, for said threshing, claim farm laborers' liens upon the grain threshed while working for the farmer as farm hands at threshing his own grain. *Heddan v. Walden Farmers Elevator Co.* 31 N. D. 392, 153 N. W. 1015. And the person employed solely to cook for said laborers so engaged in threshing should be considered as a farm laborer and as contributing directly to, and performing, the labor of garnering the grain. The cook is as much a farm laborer as the spike pitcher on the threshing rig, threshing it. In *Heddan v. Walden Farmers Elevator Co.* supra, it is stated: "The flax could neither be harvested nor threshed except by the use of machinery, and certainly the mere fact that part of plaintiff's work consisted in aiding in the operation of machinery owned and operated by the employer did not deprive plaintiff of the

character of a farm laborer." If this cook working for this farmer on the employer's own farm, assisting in threshing the employer's own grain, is not working as farm laborer, then the water boy carrying water for a crew of farm laborers is not a farm laborer. Both are farm laborers within the meaning of our lien statute.

In some of the cases, as, for instance, *McCormick v. Los Angeles City Water Co.* 40 Cal. 185, it is argued that if a cook is entitled to a lien, those furnishing provisions to eat would be entitled to one also under similar reasoning. But this overlooks the fact that under the terms of this statute the lien is given for farm labor performed, and not for provender furnished. Likewise, a surgeon performing services for a farm laborer is doing the work of a surgeon, not that of a farm laborer. No need of confusing the question before us by such conclusions as drawn in 40 Cal. 185.

The judgment appealed from should be reversed and a judgment entered in favor of plaintiff and against defendant for the sum of \$106.-50 and interest from and after October 6, 1915, together with judgment for foreclosure of the laborer's lien upon the crop threshed, together with the costs in District Court and on this appeal.

Judgment is ordered entered accordingly.

BRUCE, J. (dissenting). I am inclined to think that if the plaintiff had been employed by the defendant Magill to perform the work in question, she would have come under the statutory definition of a farm laborer. I do not believe, however, that the record warrants us in holding that she was working for him. The complaint states that "plaintiff rendered services to the defendants at the special instance and request of the defendant A. J. Kelly," and "that the defendant A. J. Kelly operated a threshing machine on the above-described premises." She claimed her lien in the complaint also "for the money so due her under her said contract upon the grains threshed by the defendant A. J. Kelly, upon lands hereinbefore described." The evidence appears to me to support the complaint and to show an employment by Kelly and work done for him rather than for Magill. As I view the case, it is immaterial when the title in the machine passed or whether it passed at all. If it passed prior to the entering upon the work, the plaintiff was none the less employed by Kelly rather than by Magill, and Kelly had merely

been paid for his work in advance. If it was to pass after the completion of the work, the payment had merely been deferred and it would make no difference as to the employment of the plaintiff.

CHRISTIANSON, J. (dissenting). I am unable to concur in the opinion prepared by my brother Goss.

The material portions of plaintiff's cause of action, as stated in her complaint, are as follows: "That from the 1st day of September, 1915, to the 6th day of October, 1915, both inclusive, this plaintiff rendered services to the defendants, at the special instance and request of the defendant A. J. Kelly, in the capacity of a farm laborer, . . . that said lands above-mentioned are owned by the defendant Roland Magill, and that said Roland Magill sowed, grew, harvested, and threshed on the above-described lands, during the season of 1915, wheat and oats, the amount of which is unknown to this plaintiff; . . . that the defendant A. J. Kelly operated a threshing machine on the above described premises and threshed grain; namely, wheat and oats grown and harvested thereon. That on the 23d day of October, 1915, this plaintiff, for the purpose of securing and perfecting a lien for the money so due her as aforesaid under her said contract, upon the grains threshed by the defendant A. J. Kelly upon the lands hereinbefore described, . . . filed in the office of the register of deeds . . . a farm laborer's lien." The evidence shows that the services performed by plaintiff consisted solely of cooking meals for the threshing crew engaged by Kelly and operating his machine.

Under the laws of this state (Comp. Laws 1913, § 6857) "any person who performs services for another in the capacity of farm laborer between the first day of April and the first day of December in any year," may, by filing an affidavit and notice, obtain "a lien on all crops of every kind grown, raised or harvested by the person for whom the services were performed during said time as security for the payment of any wages due or owing to such persons for services so performed."

"The statute" (providing for the farm laborer's lien), said Morgan, Ch. J. (*Lowe v. Abrahamson*, 18 N. D. 182, 19 L.R.A.(N.S.) 1039, 119 N. W. 241, 20 Ann. Cas. 355), "was passed to secure farm laborers against irresponsible landlords, and against the liens of implement dealers, which often covered the whole crop. We must look to the terms

of the statute to ascertain who are entitled to avail themselves of its provisions. It should be liberally construed to give effect to the intent of the legislature in enacting it. Its provisions should not be restricted or added to, as it is the sole function of the legislature to say to whom this special lien shall be given. . . . *As ordinarily understood, a farm laborer is one who labors upon a farm in raising crops, or doing general farm work. As commonly accepted, we think the words do not include those engaged in domestic work. They refer to work performed directly in connection with the crops raised on the farm.* Under the evidence, it appears that the plaintiff did no work except in the house. She did the cooking for four or five men who were working on the farm for Abrahamson, and for two other men who were working for Casey. It does not appear that the persons working for Casey did any work for Abrahamson, or in connection with the crop on the farm. . . . *We do not think that the work done by plaintiff can be classed as farm labor within the meaning of the Lien Law. Although the statute is to be liberally construed to secure a lien in favor of persons who have labored upon the farm, we are satisfied that it was not intended to include those within its provisions whose work was only indirectly connected with the crop."*

If a person whose principal labor consists of preparing meals for the men laboring upon a farm is not a farm laborer, then, certainly, a cook for a threshing crew is not. It seems to me that the term "farm laborer" merely means what is commonly understood thereby, and as so understood it means a person engaged in performing farm work proper. The term does not include a person who performs services for a farm laborer, and thereby indirectly aids in the production of the crop. When we speak of a farm laborer, would anyone believe that we referred to a person whose sole labor consisted of cooking for a threshing crew engaged in general threshing? I think not.

It seems to me that the conclusion arrived at by the majority is contrary to, and in effect overrules, *Lowe v. Abrahamson*, supra, and I am opposed to overruling decisions announcing rules of statutory construction, as it tends towards chaos and uncertainty. If the statute as construed by the court is unsatisfactory, the legislature can very easily change it. If the legislature fails to act, the people may by initiative petition propose any desired change.

The farm laborer's lien can be claimed only for services performed by the person claiming the lien. It does not inure to the benefit of a person who employs others to do the work; he will be considered a contractor, and not a farm laborer. 2 C. J. 1009.

Under our laws the owner or lessee of a threshing machine who threshes grain for another becomes entitled to a lien on the grain threshed for the amount of the thresh bill. This lien has priority over all other liens or encumbrances. Comp. Laws 1913, §§ 6854-6856. The lien to which the thresher is entitled necessarily includes the services of the various persons who work for him in and about the operation of the threshing machine, and certainly a person engaged by the owner or lessee of a threshing machine does not become entitled to a farm laborer's lien upon the grains threshed by such threshing machine. The law contemplates that a farm laborer (and the term "farm laborer" merely means what is commonly understood thereby), upon complying with the statutory provisions, becomes entitled to a lien for his services. Persons engaged by the owner or operator of a threshing machine must look to their employer for payment, and he has a right to obtain a threshing lien for the sums due him for threshing, but the persons in his employment must look to him alone for their pay, and have no right to claim a lien against the grain threshed. They are not farm laborers within the purview of the statute; nor are they employed by the owner of the crop to perform such service. It is true that in *Heddan v. Walden Farmers Elevator Co.* 31 N. D. 392, 153 N. W. 1015 (wherein the opinion was written by the writer), we held that where the farmer owns and operates his own threshing machine, and where the men engaged by him perform work under his direction in the threshing and marketing of the grain, they are farm laborers within the meaning of the statute and entitled to its protection. In the *Heddan Case* the employer owned and operated a small threshing machine of his own, with which he threshed his own grain. His farm hands performed work on the machine. The evidence showed that Heddan not only performed labor in threshing, but that prior thereto he performed labor in harvesting the grain involved in that case. The work which Heddan performed was not for a thresher engaged in general threshing, but it was labor performed under an agreement with the farmer who produced the crop, and under his direction. But in a case where a person is employed

to perform labor for a person engaged in general threshing, he is not a farm laborer, and has no right to claim a farm laborer's lien upon grains threshed, but he must look to his employer (the thresher) for payment for his services. Heddan was a farm laborer employed by the farmer, and under his direction he performed labor directly connected with the production of the crop. The plaintiff in the case at bar was employed to perform services as a cook for a threshing crew, and she was not a farm laborer within the purview of the statute as that statute was construed by this court in *Lowe v. Abrahamson*, 18 N. D. 182, 19 L.R.A.(N.S.) 1039, 119 N. W. 241, 20 Ann. Cas. 355.

W. S. NOTT COMPANY, a Corporation, v. VILLAGE OF
SAWYER, a Municipal Corporation.

(161 N. W. 202.)

Municipality — contractual liability — formalities — statutory requirements — absence of — officers — bound by acts of — duties — performance of.

1. In the absence of statutory requirements covering the formalities necessary to bind a municipality to a contractual liability, a municipality is bound by the acts of its officers in accepting a proposal.

Village trustees — allowance of bills — warrants — directs issue of — property — in payment of — authority to buy — proposal to sell — acceptance — village liable.

2. Where a board of village trustees allows a bill and directs issuance of warrants in payment for property which it is authorized to buy and which is offered for sale under the terms of a definite proposal, the proposal is accepted, and the village is liable upon the warrants so issued.

Villages — officers — debts — incurring — authority — legal petition for — by citizens and taxpayers — alternative form of — only as to form of the indebtedness — may incur liability — for purpose stated.

3. Where a legal petition is filed by citizen property owners requesting a board of village trustees to incur a debt or liability, or to issue bonds for a given purpose, the petition is in the alternative only as to the form of the liability, and the submission to vote of the question of issuing bonds does not exhaust the authority of village trustees to incur liability for the purpose stated.

Opinion filed January 13, 1917.

Appeal from District Court of Ward County, *K. E. Leighton, J.*
Reversed.

Bosard & Twiford, for appellant.

The subject-matter of the contract in question was within the power of the board of village trustees. Comp. Laws 1913, § 3861.

An illegal contract may be ratified by a subsequent performance of the acts or conditions requisite to the making of a legal contract. *Abbott, Mun. Corp.* § 282; *Denver v. Webber*, 15 Colo. App. 511, 63 Pac. 804; *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; *Gutta Percha & Rubber Mfg. Co. v. Oglalla*, 40 Neb. 775, 42 Am. St. Rep. 696, 59 N. W. 513; *Darling v. Manistee*, 166 Mich. 35, 131 N. W. 450; *Swenson v. Bird Island*, 93 Minn. 336, 101 N. W. 495.

Palda & Aaker and I. M. Oseth, for respondent.

The contract entered into between the plaintiff and the village officers was *ultra vires* and void. Comp. Laws 1913, § 3868.

A public corporation cannot evade the statutes and arrogate to itself greater authority than conferred by statute, by the simple expedient of pretending to ratify the *ultra vires* act. 26 Cyc. 676, et seq.

BIRDZELL, J. This is an action by W. S. Nott Company against the village of Sawyer, founded upon four warrants amounting, in all, to \$850. By stipulation the case was tried without a jury. The facts are, briefly, as follows: That during the month of April, 1910, plaintiff company proposed to sell to the defendant village some fire apparatus for \$850, that on the 11th of April the board of trustees of the village adopted a resolution purporting to accept the proposal of the plaintiff company, and on the same date executed a contract with the plaintiff for the purchase of the apparatus. On May 2, 1910, two petitions were presented to the board of trustees of the village, each signed by the owners of more than five eighths of the taxable property. One petition authorized the board to incur a debt or liability of \$1,500, or to issue bonds therefor, for the purpose of purchasing fire apparatus. The other petition purported to authorize the board to incur a debt by issuing refunding bonds to the amount of \$2,000, for the purpose of funding existing indebtedness. The board of trustees of the village subsequently submitted the questions of issuing bonds for the purposes stated

in the two petitions to a vote of the electorate. The election was held May 16, 1910, and both proposals were rejected. The fire apparatus for which the warrants were given was delivered to the village sometime between the 3d of May, 1910, and the 5th of July, 1910; and at a date subsequent to the petitions and election above referred to, the agent of the plaintiff company renewed his proposal to furnish the apparatus. On July 12, 1910, the village trustees voted to allow the bill of the plaintiff, and in pursuance of the vote the warrants in suit were issued. The only question involved in this case is as to the legality of the exercise by the board of trustees of the power to bind the defendant village under the facts set forth above.

Section 3861 of the Compiled Laws of 1913 includes, among the enumeration of powers of village boards, the power "to provide all necessary apparatus for the extinguishing of fires." Section 3868 of the Compiled Laws of 1913 provides that "no village incorporated under this chapter shall have the power to borrow money or incur any indebtedness, liability or issue bonds to fund any existing indebtedness unless five eighths of the citizen owners of the taxable property of such village as evidenced by the assessment roll of the preceding year, petition the board of trustees to contract such debt, loan or bonds." While the power to purchase apparatus for extinguishing fires is clearly within the legislative grant of powers to municipal corporations of the character of the defendant, the legislature has seen fit to safeguard the interests of the taxpayers to the extent of requiring, as a condition precedent to the exercise of such power, that a petition be filed, signed by five eighths of the citizen owners of the taxable property. In this case it is conceded that such a petition was filed before the warrants in question were issued, but it is contended that since the petition had not been filed prior to the formal action upon the plaintiff's proposal in April, no legal contract exists, binding the defendant. In our opinion, respondent's contention is not sound for the reason that when a statute, as in this case, vests certain power in the officers of the municipality, and when all conditions precedent to its exercise have been complied with, the liability may be incurred in any form sanctioned by law. We think the form in which the liability was incurred, namely, by the issuance of warrants at the meeting on July 12, 1910, was a sufficient exercise of the power to bind the municipality. 2 Dill. Mun. Corp. 5th ed. p.

784. It is not seriously contended by appellants that the municipality is bound by the action of the board, prior to the filing of the petition.

Respondent contends that the election at which the voters refused to sanction an issuance of bonds amounted to a rescission of the authority which might have been exercised following the petition, and that the adverse vote must be taken as a withdrawal of the signatures from the petition. We do not think there is any force in this contention, particularly in view of the fact that the statute requiring the petition, and which was in force at that time, § 2869, Revised Codes 1905, Comp. Laws 1913, § 3868, provided that it should be signed by "citizen owners of five eighths of the taxable property." Under this statute it is clear that a petition signed by a small minority of citizens would be sufficient, provided they owned five eighths of the taxable property, and the petition would not be annulled by an election which was not required by law.

It is further contended by the respondent that the petition signed by the citizen property owners was in the alternative, in that it requested the board of trustees to incur "a debt or liability of \$1,500 or issue bonds therefor," and that since, pursuant to said petition, the board of trustees had ordered an election on the question of the issuance of bonds, they had exhausted the power which the petition authorized them to exercise. As we view the petition, it does not really confer power upon the officers of the municipality. It is, as said above, but a condition precedent to the exercise of the power elsewhere conferred. A petition is required, whether it is desired to authorize the creation of a liability by contract or warrant, or upon municipal bonds. The petition is only in the alternative as to the form of the liability, not as to the request to incur liability for the purpose indicated. If bonds were to be issued, a vote was required, and when the village board acted upon the petition to the extent of submitting the question of issuing bonds to a vote, it merely took the necessary legal steps to determine whether the electors desired the liability to be incurred in that form. The result of the election is perfectly consistent with a desire upon the part of the electors to make provision for meeting the liability out of the current revenues, extended perhaps over a few years, rather than by issuing bonds therefor. We cannot say that the interpretation to this effect, which was apparently placed upon the petition by the village trustees in

later issuing the warrants in suit, was not within the intention manifested by the petitioners. It must be remembered that the only question which was submitted to the voters in this connection was the question of issuing bonds for fire apparatus. In the view we take of the case, there is no question of any void or illegal action, and no question of estoppel involved. We think the village trustees, in allowing the bill of the plaintiff company on July 12, 1910, and in issuing the village warrants therefor, sufficiently manifested the intention of accepting plaintiff's proposition to make a binding contract carrying the liability of the village.

The judgment is reversed, with costs, and the cause remanded, with directions to enter judgment for the plaintiff and against the defendant for the amount of the warrants, interest, and costs.

WILHELMINA HAGER, by J. J. Schmidt, her Guardian, v.
WILLIAM E. CLARK.

(161 N. W. 280.)

Physicians and surgeons — malpractice — damages resulting from — action to recover — fair trial — new trial — motion for — evidence — preponderance.

In an action for malpractice, where there has been a fair trial, an order denying a new trial will not be reversed when it is doubtful on which side the evidence preponderates.

Opinion filed January 13, 1917. Rehearing denied February 8, 1917.

Appeal from the District Court of Wells County, *Hon. J. A. Coffey*, J.

Affirmed.

John O. Hanchett, for appellant.

The jury must discriminate between the conditions which make the services of the physician necessary, and the evil results, if any, due to his malpractice, and no recovery can be had for an injury or condition not traceable to defendant's negligence. *Feeney v. Spalding*, 89 Me. 111, 35 Atl. 1027; *English v. Free*, 205 Pa. 624, 55 Atl. 777; *Ewing*

v. Goode, 78 Fed. 442; Georgia Northern R. Co. v. Ingram, 114 Ga. 639, 40 S. E. 708; James v. Robertson, 39 Utah, 414, 117 Pac. 1068, 2 N. C. C. A. 782; Kernodle v. Elder, 23 Okla. 743, 102 Pac. 138, 21 Am. Neg. Rep. 331; Marchand v. Bellin, 158 Wis. 184, 147 N. W. 1033; Martin v. Courtney, 75 Minn. 255, 77 N. W. 813, 87 Minn. 197, 91 N. W. 487; Pettigrew v. Lewis, 46 Kan. 78, 26 Pac. 458; Phebus v. Mather, 181 Ill. App. 274; Spain v. Burch, 169 Mo. App. 94, 154 S. W. 172; Whitesell v. Hill, — Iowa, —, 66 N. W. 894; Craig v. Chambers, 17 Ohio St. 254; Levy v. Vaughan, 42 App. D. C. 146; 30 Cyc. 1584; 9 Enc. Ev. 833; Wharton & S. Med. Jur. 517; Warmath v. O'Daniel, 16 L.R.A.(N.S.) 416, note.

To hold a physician in damages, it must appear that he neglected the proper treatment through inattention or carelessness. Hills v. Shaw, 69 Or. 460, 137 Pac. 229; Long v. Austin, 153 N. C. 508, 69 S. E. 500; Luka v. Lowrie, 171 Mich. 122, 41 L.R.A.(N.S.) 290, 136 N. W. 1106; McGraw v. Kerr, 23 Colo. App. 163, 128 Pac. 870; Mohr v. Williams, 95 Minn. 261, 1 L.R.A.(N.S.) 439, 111 Am. St. Rep. 462, 104 N. W. 12, 5 Ann. Cas. 303; Staloch v. Holm, 100 Minn. 276, 9 L.R.A.(N.S.) 712, 111 N. W. 264; Van Meter v. Crews, 149 Ky. 335, 148 S. W. 40; Williams v. Poppleton, 3 Or. 139; Wurdemann v. Barnes, 92 Wis. 206, 66 N. W. 111; Barfield v. South Highlands Infirmary, 191 Ala. 553, 68 So. 30, Ann. Cas. 1916C, 1097; Brydges v. Cunningham, 69 Wash. 8, 124 Pac. 132.

Where the immediate facts necessary to sustain a verdict rest on conjecture or suspicion alone, it should not be said in any enlightened tribunal that it could reasonably sustain a verdict. Phebus v. Mather, 181 Ill. App. 274; Staloch v. Holm, 100 Minn. 276, 9 L.R.A.(N.S.) 712, 111 N. W. 264; Martin v. Courtney, 87 Minn. 197, 91 N. W. 487; Georgia Northern R. Co. v. Ingram, 114 Ga. 639, 40 S. E. 708; Feeney v. Spalding, 89 Me. 111, 35 Atl. 1027; Bigney v. Fisher, 26 R. I. 402, 59 Atl. 72.

Where want of skill is not shown by expert evidence, applied to the facts, in this class of cases, there is no evidence of negligence, and no recovery can be had. Laymen cannot testify on the question of negligence. Baker v. Lane, 23 R. I. 224, 49 Atl. 963; Carstens v. Hansleman, 61 Mich. 426, 1 Am. St. Rep. 606, 28 N. W. 159; Ewing v. Goode, 78 Fed. 442; Longfellow v. Vernon, 57 Ind. App. 611, 105 N.

E. 178; *Rogers v. Key*, 171 Mich. 551, 137 N. W. 260; *Neifert v. Hasley*, 149 Mich. 232, 112 N. W. 705; *Bonnet v. Foote*, 47 Colo. 282, 28 L.R.A.(N.S.) 136, 107 Pac. 252; *Adolay v. Miller*, 60 Ind. App. 656, 111 N. E. 313; *Brown v. Goffe*, 140 App. Div. 353, 125 N. Y. Supp. 458; *Kline v. Nicholson*, 151 Iowa, 710, 130 N. W. 722, 1 N. C. C. A. 290; *Lawson v. Crane*, 83 Vt. 115, 74 Atl. 614; *Moline v. Christie*, 180 Ill. App. 334.

In such cases much is left to the judgment of the physician in charge of the case, and a clear case of negligence or of improper and careless treatment must be established. *Leighton v. Sargent*, 27 N. H. 460, 59 Am. Dec. 388; *Ely v. Wilbur*, 49 N. J. L. 685, 60 Am. Rep. 668, 10 Atl. 358, 441; 22 Am. & Eng. Enc. Law, 2d ed. 798, 804, and cases cited; *Harris v. Fall*, 27 L.R.A.(N.S.) 1174, 100 C. C. A. 497, 177 Fed. 79, 3 N. C. C. A. 176; *Marchand v. Bellin*, 158 Wis. 184, 147 N. W. 1033; *Bonnet v. Foote*, 47 Colo. 282, 28 L.R.A.(N.S.) 136, 107 Pac. 252; *Moline v. Christie*, 180 Ill. App. 334; *Booth v. Andrus*, 91 Neb. 810, 137 N. W. 884; *Coss v. Spaulding*, 41 Utah, 447, 126 Pac. 468; *Dashiell v. Griffith*, 84 Md. 363, 35 Atl. 1094; *Dorris v. Warford*, 124 Ky. 768, 9 L.R.A.(N.S.) 1090, 100 S. W. 312, 14 Ann. Cas. 602; *Dunbault v. Thompson*, 109 Iowa, 199, 80 N. W. 324; *Dye v. Corbin*, 59 W. Va. 266, 53 S. E. 147; *Gates v. Fleisher*, 67 Wis. 504, 30 N. W. 674.

In determining what constitutes reasonable and ordinary care, skill, and diligence, the test is that which physicians and surgeons in the same neighborhood and in the same general line of practice ordinarily have and exercise in like cases and under like or similar circumstances. *Whitesell v. Hill*, — Iowa, —, 66 N. W. 894, 101 Iowa, 629, 37 L.R.A. 830, 70 N. W. 750, 2 Am. Neg. Rep. 134; *McBride v. Huckins*, 76 N. H. 206, 81 Atl. 528; *Cranford v. O'Shea*, 75 Wash. 33, 134 Pac. 486; *Eurk v. Foster*, 114 Ky. 20, 59 L.R.A. 277, 69 S. W. 1096, 1 Ann. Cas. 304; *Allen v. Voje*, 114 Wis. 1, 89 N. W. 924; *Ferrell v. Ellis*, 129 Iowa, 614, 105 N. W. 993; *Dye v. Corbin*, 59 W. Va. 266, 53 S. E. 147.

The performance by a physician of his implied contract is determined by the standards of his profession at the time of the treatment, in similar localities, and he is not bound to have a greater knowledge or skill, nor to exercise a higher degree of care and skill, than those possessed and

exercised by other doctors of the profession, practising in the same or similar localities. *Wurde mann v. Barnes*, 92 Wis. 206, 66 N. W. 111; *Martin v. Courtney*, 87 Minn. 197, 77 N. W. 813; *Peck v. Hutchinson*, 88 Iowa, 320, 55 N. W. 511; *Van Skike v. Potter*, 53 Neb. 28, 73 N. W. 295; *Booth v. Andrus*, 91 Neb. 810, 137 N. W. 884; *Dye v. Corbin*, 59 W. Va. 266, 53 S. E. 147; *Griswold v. Hutchinson*, 47 Neb. 727, 66 N. W. 819; 22 Am. & Eng. Enc. Law, 2d ed. 799; 30 Cyc. 1570, § b; 3 Wharton & S. Med. Jur. §§ 473, 459.

In no case except by special contract is a physician held to insure his treatment or that it will result in a cure. He is not bound to secure certain results at all hazards, and a failure does not raise a presumption of negligence. *Baker v. Langan*, 165 Iowa, 346, 145 N. W. 513; *Bonnet v. Foote*, 47 Colo. 282, 28 L.R.A.(N.S.) 136, 107 Pac. 252; *Booth v. Andrus*, 91 Neb. 810, 137 N. W. 884; *Coombs v. King*, 107 Me. 376, 78 Atl. 468, Ann. Cas. 1912C, 1121, 3 N. C. C. A. 167; *English v. Free*, 205 Pa. 624, 55 Atl. 777; *Getchell v. Hill*, 21 Minn. 464; *Miller v. Toles*, 183 Mich. 252, L.R.A.1915C, 595, 150 N. W. 118; *Kuhn v. Brownfield*, 34 W. Va. 252, 11 L.R.A. 700, 12 S. E. 519; *Lee v. Moore*, — Tex. Civ. App. —, 162 S. W. 437; *McGraw v. Kerr*, 23 Colo. App. 163, 128 Pac. 870; *Longfellow v. Vernon*, 57 Ind. App. 611, 105 N. E. 178; *Martin v. Courtney*, 75 Minn. 255, 77 N. W. 813, 87 Minn. 197, 91 N. W. 487; *Sawyer v. Berthold*, 116 Minn. 441, 134 N. W. 120; *Tomer v. Aiken*, 126 Iowa, 114, 101 N. W. 769; 22 Am. & Eng. Enc. Law, 2d ed. 800; 30 Cyc. 1573; 3 Wharton & S. Med. Jur. § 466; *Whitesell v. Hill*, 37 L.R.A. 831, note.

A physician who has given his patient the benefit of his best judgment is not liable for negligence, even though his judgment was erroneous. *Brydges v. Cunningham*, 69 Wash. 8, 124 Pac. 132; *Coombs v. King*, 107 Me. 376, 78 Atl. 468, Ann. Cas. 1912C, 1121, 3 N. C. C. A. 167; *Barfield v. South Highlands Infirmary*, 191 Ala. 553, 68 So. 30; *Williams v. Poppleton*, 3 Or. 139; *Tefft v. Wilcox*, 6 Kan. 46; *Staloch v. Holm*, 100 Minn. 276, 9 L.R.A.(N.S.) 712, 111 N. W. 264; *Luka v. Lowrie*, 171 Mich. 122, 41 L.R.A.(N.S.) 290, 136 N. W. 1106; *Spain v. Burch*, 169 Mo. App. 94, 154 S. W. 172; 22 Am. & Eng. Enc. Law, 2d ed. 804; 30 Cyc. 1578; 3 Wharton & S. Med. Jur. 501.

A physician on the ground and in charge of the case may use any

one of two or more equally approved methods of treatment. *De Long v. Delaney*, 206 Pa. 226, 55 Atl. 965; *Long v. Austin*, 153 N. C. 508, 69 S. E. 500; *Cozine v. Moore*, 159 Iowa, 472, 141 N. W. 424; *Lorenz v. Booth*, 84 Wash. 550, 147 Pac. 31; *McClarín v. Grenzfelder*, 147 Mo. App. 478, 126 S. W. 817; *Spain v. Burch*, 169 Mo. App. 94, 154 S. W. 172; *Miller v. Toles*, 183 Mich. 252, L.R.A.1915C, 595, 150 N. W. 118; *Marchand v. Bellin*, 158 Wis. 184, 147 N. W. 1033; *Williams v. Poppleton*, 3 Or. 139; *Pepke v. Grace Hospital*, 130 Mich. 493, 90 N. W. 278; *Hesse v. Knippel*, 1 Mich. N. P. 109; *Hallam v. Means*, 82 Ill. 379, 25 Am. Rep. 328; 3 Wharton & S. Med. Jur. 501; *Leighton v. Sargent*, 27 N. H. 460, 59 Am. Dec. 388; *Wood v. Barker*, 49 Mich. 295, 13 N. W. 597; *Wurde mann v. Barnes*, 92 Wis. 206, 66 N. W. 111; *Tomer v. Aiken*, 126 Iowa, 114, 101 N. W. 769; *Van Skike v. Potter*, 53 Neb. 28, 73 N. W. 295; *Pelky v. Palmer*, 109 Mich. 561, 67 N. W. 561; *Hathorn v. Richmond*, 48 Vt. 557; *Boon v. Murphy*, 108 N. C. 187, 12 S. E. 1032; *Boom v. Reed*, 69 Hun, 426, 23 N. Y. Supp. 421; 30 Cyc. 1576; 22 Am. & Eng. Enc. Law, 2d ed. 803; *Adams v. Henry*, Ann. Cas. 1912C, 831, note; *Ebner v. Mackey*, 51 L.R.A. 298, note.

Where the injury of which complaint is made is the result of the mutual and concurring negligence or carelessness of both patient and physician, there can be no recovery. *Whitesell v. Hill*, — Iowa, —, 66 N. W. 894; *McGraw v. Kerr*, 23 Colo. App. 163, 128 Pac. 870; *Young v. Mason*, 8 Ind. App. 264, 35 N. E. 521; *Geiselman v. Scott*, 25 Ohio St. 86; *Chamberlain v. Porter*, 9 Minn. 260, Gil. 244; *Becker v. Janinski*, 15 N. Y. Supp. 675; 30 Cyc. 1579; 22 Am. & Eng. Enc. Law, 2d ed. 805; 3 Wharton & S. Med. Jur. 508; *Potter v. Warner*, 91 Pa. 362, 36 Am. Rep. 668.

Plaintiff suffered no pain, sickness, or weakness which was not the natural and probable result of her condition, and which would not have been almost certain to follow, regardless of any known method of treatment, and in view of this the jury should not have been permitted to speculate the defendant into responsibility. *Piles v. Hughes*, 10 Iowa, 579; *Dye v. Corbin*, 59 W. Va. 266, 53 S. E. 147; *Staloch v. Holm*, 100 Minn. 276, 9 L.R.A.(N.S.) 712, 111 N. W. 264; 22 Am. & Eng. Enc. Law, 2d ed. 800.

In such a case, if the evidence leaves it as probable that the injury

was the result of one cause as much as the other, there cannot be a recovery. *Merriam v. Hamilton*, 64 Or. 476, 130 Pac. 406; *Yaggle v. Allen*, 24 App. Div. 594, 48 N. Y. Supp. 827; *Coombs v. James*, 82 Wash. 403, 144 Pac. 536; *Dye v. Corbin*, 59 W. Va. 266, 53 S. E. 147; *Ewing v. Goode*, 78 Fed. 442; *Gores v. Graff*, 77 Wis. 174, 46 N. W. 48; *Martin v. Courtney*, 87 Minn. 197, 91 N. W. 487.

Where the inference to be drawn from the facts proved is as consistent with skill, care, and diligence as with the lack of them, no recovery can be had. *Pelky v. Palmer*, 109 Mich. 561, 67 N. W. 561; *Ewing v. Goode*, 78 Fed. 442; *Farrell v. Haze*, 157 Mich. 374, 122 N. W. 197.

Where there is want of any tangible showing of negligence, and want of such showing of ills, suffering, and sickness other than those natural and probable under the circumstances, a verdict should be directed for defendant on motion. *De Long v. Delaney*, 206 Pa. 226, 55 Atl. 965; *Cozine v. Moore*, 159 Iowa, 472, 141 N. W. 424; *English v. Free*, 205 Pa. 624, 55 Atl. 777; *Ewing v. Goode*, 78 Fed. 442; *Friend v. Cramer*, 236 Pa. 618, 85 Atl. 12, Ann. Cas. 1914A, 272; *Goodman v. Bigler*, 133 Ill. App. 301; *Griswold v. Hutchinson*, 47 Neb. 727, 66 N. W. 819; *Hills v. Shaw*, 69 Or. 460, 137 Pac. 229; *Jones v. Vroom*, 8 Colo. App. 143, 45 Pac. 234; *Langford v. Jones*, 18 Or. 307, 22 Pac. 1064; *Marchand v. Bellin*, 158 Wis. 184, 147 N. W. 1033; *Martin v. Courtney*, 87 Minn. 197, 91 N. W. 487; *Adolay v. Miller*, 60 Ind. App. 656, 111 N. E. 313.

Trial courts ought to grant a new trial whenever their superior and more comprehensive judgment teaches them that the verdict of the jury fails to give substantial justice to the parties. *Dewey v. Chicago & N. W. R. Co.* 31 Iowa, 373; *Chicago Cottage Organ Co. v. Caldwell*, 94 Iowa, 584, 63 N. W. 336; *Martin v. Courtney*, 87 Minn. 197, 91 N. W. 487; *Kernodle v. Elder*, 23 Okla. 743, 102 Pac. 138, 21 Am. Neg. Rep. 331.

The damages allowed are very excessive, and are not the result of calm deliberation. *Vallo v. United States Exp. Co.* 147 Pa. 404, 14 L.R.A. 743, 30 Am. St. Rep. 741, 23 Atl. 594; *Miller v. Brown*, 82 Iowa, 79, 47 N. W. 895; *Hansen v. Crocker*, 160 Ill. App. 514; *Howard v. Grover*, 28 Me. 97, 48 Am. Dec. 478; *Ramsdell v. Grady*, 97 Me. 319, 54 Atl. 764; *Reynolds v. McManus*, 139 Iowa, 242, 117

N. W. 667; Galveston, H. & S. A. R. Co. v. Craighead, — Tex. Civ. App. —, 175 S. W. 454; Hoffman v. Watkins, 89 Wash. 661, 155 Pac. 159; Evans v. Roberts, 172 Iowa, 653, 154 N. W. 523, 11 N. C. C. A. 728.

F. J. Funke and E. R. Sinkler, for respondent.

A motion for a directed verdict for defendant admits, for the purposes of the motion, the truth of the testimony which supports plaintiff's case, together with all inferences which may be drawn therefrom, and the untruth of his allegations which are denied by plaintiff. Blakeslee's Express & Van Co. v. Ford, 215 Ill. 230, 74 N. E. 135, 18 Am. Neg. Rep. 376; McLean v. Omaha & C. B. R. & Bridge Co. 72 Neb. 447, 100 N. W. 935, 103 N. W. 285; Walling v. Bown, 9 Idaho, 184, 72 Pac. 960.

The court is bound to assume the truth of the facts testified to by or on behalf of plaintiff, giving such evidence the most favorable construction. Delaware & H. Canal Co. v. Mitchell, 211 Ill. 379, 71 N. E. 1026; Stevens v. United Gas & E. Co. 73 N. H. 159, 70 L.R.A. 119, 60 Atl. 848; Bennison v. Walbank, 38 Minn. 313, 37 N. W. 447.

A verdict in a case against a physician for malpractice, based on conflicting evidence on all points, will warrant the appellate court in assuming that all the allegations of defendant's want of skill and of negligence, have been proved. Baxter v. Campbell, 17 S. D. 475, 97 N. W. 386; Meadows v. Hawkeye Ins. Co. 67 Iowa, 57, 24 N. W. 591; Degelau v. Wight, 114 Iowa, 52, 86 N. W. 36.

In this case the jury had the right to find from the testimony of the doctors that the operation performed by defendant caused the scar and the stricture of the trachea, and also chronic pharyngitis and laryngitis, and that this condition was permanent. State v. Porter, 34 Iowa, 131; Degelau v. Wright, 114 Iowa, 52, 86 N. W. 36; Brownfield v. Chicago, R. I. & P. R. Co. 107 Iowa, 254, 77 N. W. 1038, 5 Am. Neg. Rep. 331.

ROBINSON, J. This is an action for malpractice by a physician. The defendant appeals from a verdict and judgment against him for \$5,000, and from an order denying a new trial. The complaint is, in effect, that in July, 1914, the plaintiff accidentally swallowed a peanut, which lodged in one of her bronchial tubes. That defendant was employed as

physician to remove the peanut and to treat the plaintiff; that he cut into her throat and attempted to remove the peanut without having a proper instrument for that purpose, and kept her in terrible pain for a week, when she was taken to Minot and by the use of a proper instrument, known as a bronchoscope, the peanut was quickly removed. By the proper use of a bronchoscope a physician may see into the lungs. He does not grope in the dark. The doctor claims he told the parents of the child that he did not have such an instrument, and undertook to remove the peanut by the operation of cutting into the throat and the use of forceps. The doctor claims that when the child was brought to him about 11 o'clock at night, there was danger of suffocation, and the operation was performed to prevent suffocation rather than to remove the peanut. There is a large volume of conflicting testimony, from which it fairly appears that if it was reasonably necessary to cut into the throat as an emergency operation, when the doctor failed to remove the peanut by forceps, he should have at once telegraphed to Minot for a bronchoscope or should have directed that the child be taken immediately to Minot. There does not appear any reasonable excuse for keeping the child in agony for six days, hoping that it might cough up the peanut.

The counsel for plaintiff contend that if there is any evidence to support the verdict, it must be sustained; and that the evidence does overwhelmingly support the verdict. We do not agree with either proposition, but assuredly there is evidence on which honest, conscientious men and judges might well differ in opinion, and there is ample evidence to support the verdict, and that is really the only question in the case.

The defendant has had a fair trial, and it seems but fair to him and to plaintiff to end the expensive litigation. On considering the evidence and the arguments, we feel no assurance that a new trial would benefit the defendant. Hence, this court affirms the judgment and the order denying a motion for a new trial.

In this and in similar cases the judge who writes this opinion holds that the bulk of damages which may be recovered should go directly to the party sustaining the damage, regardless of any agreement with the infant plaintiff or her guardian, and the the attorney's fee should be

limited to a just and reasonable sum, to be allowed by order of the court, to be entered and made a part of the record.

CHRISTIANSON and GRACE, JJ., concur in an affirmance of the judgment.

On Petition for Rehearing (filed February 8, 1917).

ROBINSON, J. As the original opinion shows, defendant had a fair trial. The verdict is well sustained by the evidence, and it is doubtful if a new trial would benefit the defendant or any person. On a second trial the verdict might well be for a larger amount. Hence, the motion for a rehearing is denied.

ASA J. STYLES v. M. LILLIAN STYLES.

(161 N. W. 198.)

Custody of child — action concerning — judgment — findings — conclusions — attorneys' fees.

This is an action or motion concerning the custody of a minor child of the plaintiff and the defendant. There was no good reason for commencing the action, and the judgment has been given for a large sum of costs and attorneys' fees, without any findings of fact or conclusions of law; and hence the judgment is reversed and the action dismissed without costs.

Opinion filed January 13, 1917.

Appeal from District Court, Benson County, *Hon. W. J. Kneeshaw*, Special Judge.

Reversed.

Asa J. Styles, for appellant.

Every reasonable presumption will be indulged in support of an "order for judgment," made after a hearing on trial by a court of competent jurisdiction. But in this case there was no trial or judgment upon final hearing. *Garr, S. & Co. v. Spaulding*, 2 N. D. 414, 51 N. W. 867.

An award of \$150 "motion costs and sheriff's fees" is unauthorized. Rev. Codes 1905, § 4071, Comp. Laws 1913, § 4402.

A judgment for costs named by the court in a lump sum is erroneous. *Power v. King*, 18 N. D. 602, 138 Am. St. Rep. 784, 120 N. W. 543, 21 Ann. Cas. 1108; *Engholm v. Ekrem*, 18 N. D. 185, 119 N. W. 35; *Dahlund v. Lorentzen*, 30 N. D. 275, 152 N. W. 684.

Knauf & Knauf, for respondent.

Findings and conclusions are required only in the event of final decisions being entered. Comp. Laws 1913, § 7639.

Costs in such cases are a matter of discretion of the trial court. Comp. Laws 1913, § 7795; *Engholm v. Ekrem*, 18 N. D. 185, 119 N. W. 35.

ROBINSON, J. This suit relates to an unfortunate family affair. The plaintiff and the defendant were man and wife. They obtained a divorce and the care and custody of their daughter, a little girl, was awarded to the mother on condition that the father might visit with his child at certain reasonable times. The action was commenced to restrain the defendant from taking the child to Canada, where the defendant had made preparations to take a homestead. Numerous affidavits were taken, and it seems to be proven and conceded that the defendant had contemplated taking the child to Canada immediately prior to the commencement of this action, and as a result of the action she abandoned her purpose. The purpose of the action was to accomplish what might have been done by motion in the original action. It was submitted on numerous affidavits the same as a motion, and without any findings of fact or conclusions of law it was by the court adjudged that the decree of divorce be and remain in full force and effect, except that the minor children should not be removed by said Lillian Styles from the state of North Dakota without the written order or consent of the judge of the district court or one of the judges of the supreme court. The document called a judgment gave to the plaintiff all the relief he demanded, and with it awarded judgment against him for attorneys' fees for costs and expenses, amounting to a large sum. And there was no showing that the plaintiff had more property than the defendant. The complaint avers that the defendant has a mania for acquiring land and

property, and that in the divorce suit she testified that she was worth \$20,000 in her own right.

In an unfortunate matter of this kind between husband and wife, where we may assume they stand fairly on an equality and one is as well to do as the other, there is no reason for awarding costs to either of them, unless pursuant to some statute. And as the whole proceeding from beginning to end was grossly irregular and there is no good reason shown for modifying the original judgment, which was entered pursuant to a written stipulation, it is ordered that the final order or judgment herein be, and the same is hereby, reversed and vacated, and the action is dismissed without costs to either party.

CASS COUNTY, NORTH DAKOTA, a Municipal Corporation, and
the County Commissioners of Cass County, North Dakota, v.
BESSIE R. NIXON.

(L.R.A.1917C, 897, 161 N. W. 204.)

Constitutional law — county court — jurisdiction — exclusive — probate and testamentary matters — administrators — guardians — executors — accounts of — sale of estate lands.

1. Section 111 of the Constitution of the state of North Dakota, so far as it is germane to the issues in this case is as follows: to wit: "The county court shall have exclusive jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators, and guardians, the sale of land by executors, administrators, and guardians, and such other probate jurisdiction as may be conferred by law."

Mother's Pension Act — constitutional — minors of tender years — guardian — natural.

2. Chapter 185 of the Session Laws of 1915, commonly called Mother's Pension Act, is not in conflict with § 111 of the Constitution. The persons to be protected and benefited by chapter 185 are minors of tender years, whose natural guardians are unable to furnish such minors the absolute necessities of life; such minors and their estates are proper subjects of guardianship.

Constitution — state laws.

3. Chapter 185 of the Laws of 1915 is not in contravention of § 172 of the Constitution of the state of North Dakota, and therefore is not unconstitutional.

Persons and estates — matters concerning — subject of legislation — judicial investigation — matters of guardianship.

4. Whenever any matters concerning the persons or estates of minors become the subject of legislation or judicial investigation and determination, or when such matters are considered or acted upon by other than a legislative or judicial body, they are each nevertheless dealing with matters of guardianship.

Maternal and parental protection — influence — value of — state recognition — indigent mother — minor children — control and protection — petition — county court — jurisdiction.

5. The state, by chapter 185, recognized the pure and valuable influence of maternal parental protection in the proper development of such minors, and therefore provides where such indigent mother is a fit and proper person for leaving her indigent minors in her possession and control, she being by the very laws of nature closely attached to them, rather than take such indigent minors and place them under the guardianship of strangers.

Courts — county — jurisdiction.

6. The county court of Cass county, sitting as a probate court, had jurisdiction of the subject-matter of the petition.

Opinion filed January 16, 1917.

Appeal from District Court of Cass County, *Pollock, J.*

Affirmed.

Fowler & Green, for appellants.

Pierce, Tenneson & Cupler, for respondent.

GRACE, J. This case comes before this court by an appeal from an order and judgment of the district court of Cass county, North Dakota, which affirmed an order of the county court of Cass county, which order of the county court made an allowance to the respondent, Bessie R. Nixon, under the provisions of chap. 185, Sess. Laws 1915; and the appeal is also from an order of said county court overruling the demurrer interposed by appellants to the petition of the respondent.

All the facts involved in this case are stipulated or conceded by the respective parties to the action. Among the controlling facts so stipulated or conceded are those admitting the indigency of the mother, the minority of the children of such mother; that such minor children are

under the age of fourteen years; and that the county court, after investigation of all the facts of the case, made its order allowing certain amounts of money for the support and maintenance of each child; said amount to be paid to the mother for such purpose; and that she was a fit and proper person to whom to pay it for the support of such children.

The questions involved and presented upon this appeal are purely questions of law. The dominant question of law here presented is: Is chapter 185 of the Session Laws of 1915 unconstitutional? The decision of this major question will virtually decide all other questions of law presented in this case. Section 111 of the state Constitution, so far as it is applicable to this case, is as follows, to wit: "The county court shall have exclusive original jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators and guardians, the sale of lands by executors, administrators and guardians, and such other probate jurisdiction as may be conferred by law." Chapter 185, Sess. Laws 1915 (commonly called Mother's Pension Act), is not in conflict with § 111 of the state Constitution. The persons, in fact the real and actual recipients of the protection and benefits conferred by chap. 185, Sess. Laws 1915, are indigent minors of tender years, who are placed in such condition that by reason of the poverty of the mother and her inability to supply such minors with those absolute necessities of life, such as proper clothing to protect the bodies of such infants from the wintry winds of this northern region, where climatic conditions at certain seasons become so exceedingly frigid; and the indigent mother not having the financial ability to procure fuel for the home of such infants, or food to appease their pangs of hunger, and from these causes the very existence of such children and moral welfare, their health and physical development becomes greatly endangered. These minors, mere infants, cannot supply themselves. Their indigent mother, reduced to the depths of penury and want, cannot do so, and the lives of these minors of tender years becomes imperiled unless the state takes an interest in this regrettable condition, too frequently found in this land where the necessities of life are produced in such abundance.

The laws of the state regarding the persons or estates of minors were

enacted by reason of the authority found in § 111 of the state Constitution, and jurisdiction in matters concerning either the person or estates, or both of minors, was given to the county court. The law under consideration is chapter 185, being one which involves the care and protection of estates of minors of very tender years, and the care of the estate of such minors being one of the cardinal duties of county courts, chapter 185 having appointed the county court to perform and execute the duties set forth in chapter 185 toward and concerning the estate of such minors, the rendition of said duty by the county court towards such minors is the exercise of a judicial function, or the exercise of a power largely partaking of the nature of a judicial function, and is not, properly speaking, an administrative function. The exact line of demarcation where judicial functions end and administrative functions begin is not easily discernible, and is fraught with many difficulties, just as perplexing as it is to accurately determine the exact line of demarcation which segregates the animal from the vegetable kingdom, and as we draw near the extremity of one the shadows of the other, figuratively speaking, are falling across our pathway. The duties prescribed by chapter 185 for the county court are judicial, and not administrative in their intent, nature, and effect, and are in the nature of guardianship functions, the persons to be assisted and protected being minors. For authority as to nature of this character of guardianship, see *State ex rel. Kol v. North Dakota Children's Home Soc.* 10 N. D. 493, 88 N. W. 273; *State ex rel. Stearns v. Klasen*, 123 Minn. 382, 49 L.R.A.(N.S.) 597, 143 N. W. 984, and laws of North Dakota relating to the persons and estates of minors. Assuming that chapter 185 had provided that where mothers were indigent and thereby unable to care for her minor children under fourteen years of age, said children should be taken away from the mother by the state and a guardian appointed for them and an allowance similar in nature, amount, and terms to that in chapter 185 provided for the use, benefit, and protection of said children, thus creating an estate for such minors, then there could be no doubt of the county court's authority and jurisdiction in such case, nor that its function therein would be other than judicial. The same meaning and intention is in chapter 185, except the mother, the natural guardian when fit, is left in charge of such minor children and infants of such tender years, for many excellent reasons; her natural affection and

mother love are potent and good forces, and are exceedingly valuable to the child in its evolution from childhood to a more mature state, and no artificial contrivance or invention of law can supplant the valuable influence and beneficent effect of motherly affection in such cases; and the state has been all too tardy in enacting a humane law upon this subject that would harmonize with the laws of human nature.

In the construction of a statute, as a general rule, the meaning and intent of the legislature should be sought from the whole law, and not from the title of the act alone. Perhaps, in special cases, we may look to the title alone, as where there is the contention a law is unconstitutional on the ground that the title of the law embraces more than one subject. The laws enacted by the legislature should be upheld where possible, and unless such law is in direct conflict with some express provision of the state or Federal Constitutions, it should be upheld, but where a legislative act does conflict with an express provision of a state Constitution, or an express provision of the Federal Constitution, such legislative act should and must be by the courts held to be unconstitutional and therefore inoperative and void. The authority of the courts to declare legislative acts void is not an express power, granted to courts by the state Constitution, and unless a legislative act contravenes an express provision of our state Constitution it should be upheld, and, conversely, if the legislative act does contravene an express provision of our state Constitution or the express powers of a Federal Constitution, it should be, and must be, held to be unconstitutional and void. An observance of this rule will operate to preserve to each division of government its respective functions; that is, the executive branch will exercise jurisdiction and power only in the proper execution of laws and proper enforcement of laws; the legislative branch, jurisdiction, and power only in the enactment of laws, and the judicial branch, jurisdiction, and power only in the interpretation of laws. The intent of the legislature in enacting into law chapter 185 is founded upon sound, most progressive, and scientific principles of public policy, and the law is a monument of credit to the legislature which enacted it. Two of the most important, weighty, and far-reaching problems with which the state has to deal are the public health and the elimination of crime. It is a sociological truth that if the environment of childhood is extreme poverty and continual want and penury, accompanied by scanty

clothing, unnutritious, unwholesome, and scanty food, we may expect such an environment must of necessity waste the energies of childhood and subject it to the inroads of disease, which may be communicated to part of the public. Meantime this continued want and misery must weaken the moral fiber of childhood, at the very period in life when the child's mind and being are most susceptible to impressions, either good or bad. As was well said by the noted Italian criminologist, Ferri: "Want is the strongest poison for the human body and soul. It is the fountainhead of all inhuman and antisocial feeling. Where want spreads out its wings, the sentiments of love and affection of brotherhood are impossible." Therefore, the public policy of chapter 185 is the protection of the public health and the elimination of an environment which has a tendency to weaken the moral fiber of those of tender years, and thus superinduce crime. In conclusion, we also may say, we are convinced the duties imposed upon the county court by chapter 185 are judicial in their nature, but if to some extent they appear to be and in a small degree partake of the nature, in some slight respects, to that of administrative powers, yet nevertheless, the granting of the exercise of these powers to the county court in the case here presented in no way contravenes the expressed provisions of § 172 of the state Constitution.

Even if the duties prescribed for the county courts in chapter 185 should be conceded in some respects to consist and be of the nature of administrative duties, can it be said that the legislature, standing as the direct representative of the people—of the whole public—have not the authority to delegate those powers to the county court when it is to the direct interest of public policy and the welfare, life, and perpetuity of the state itself to do so, and where, as in this case, the power delegated in no way directly contravenes § 172 of the Constitution, either expressly or indirectly. The legislature unquestionably has the authority to distribute such minor power where, in its judgment, it may accomplish the greatest good in the interest of the state itself. Upon this proposition, see *Martin v. Tyler*, 4 N. D. 278, 25 L.R.A. 838, 60 N. W. 392. See also *State ex rel. Linde v. Taylor*, 33 N. D. 76, L.R.A.—, —, 156 N. W. 561; *Kermott v. Bagley*, 19 N. D. 345, 124 N. W. 397. For instance, boards of health act within the county, create debts and bills while in the performance of their duty and when trying to maintain

the public health. And such bills and debts so created by the board of health are audited by the board of health and certified to the county commissioners, and they must pay them as other county expense, and many examples might be given if it were deemed necessary.

We think, for the foregoing reasons, on the whole the law is constitutional and grounded, in the deepest interests of the public good and welfare, and is in the interests of the protection and perpetuity of the state itself. For the reasons stated, the order and judgment of the District Court of Cass County, North Dakota, affirming the order of the County Court of Cass County, making an allowance to respondent, Bessie R. Nixon, is affirmed; and the order of the District Court of Cass County, North Dakota, affirming the order of said County Court overruling the demurrer interposed by appellants to the petition of respondent, is also affirmed.

BRUCE, Ch. J. I concur in the opinion of Mr. Justice Grace. I merely desire to add that in my opinion the word "probate," as used in the clause, "such other probate jurisdiction as may be conferred by law," does not merely apply to the proof of wills, but is much more comprehensive in its terms, and is intended to include such powers as are usually exercised by probate and county courts. See Bouvier's Law Dict. 2728, *Johnson v. Harrison*, 47 Minn. 575, 28 Am. St. Rep. 382, 50 N. W. 923, and the various editions of the statutes of North Dakota in which the term "Probate Code" has been used and as so used has included much more than the mere proof of wills.

CHRISTIANSON, J. (concurring specially). I concur in the result announced in the foregoing opinion. It is conceded by counsel for appellant that public moneys may be lawfully expended for pensions for indigent mothers. The sole complaint is that the legislature chose the wrong tribunal or board to administer the law.

I do not believe that the duties to be performed under the Mother's Pension Act are necessarily embraced within that class of governmental functions designated in the Constitution as the "fiscal affairs" of the county, and required to be performed by the board of county commissioners. But I am not wholly satisfied that the duties imposed upon the county court fall within the "probate jurisdiction" conferred upon

county courts by § 111 of the state Constitution. It seems to me that the duties imposed are neither wholly administrative nor wholly judicial, but rather that they are of such nature as to permit the legislature to choose such instrumentality as it deems best to carry out its will. See *Bair v. Struck*, 29 Mont. 45, 63 L.R.A. 481, 74 Pac. 71, and authorities cited therein.

The law is presumed to be constitutional. This presumption becomes conclusive unless it is shown that the enactment is prohibited by the Constitution of the state or of the United States. And the party asserting the statute to be unconstitutional must point to the particular constitutional provision violated. *State ex rel. Linde v. Taylor*, 33 N. D. 76, L.R.A.—, —, 156 N. W. 564. Appellant in this case has failed to point to any constitutional provision violated by the law.

RAY SWALLOW v. FIRST STATE BANK, a Corporation.

(161 N. W. 207.)

Special verdict — finding of jury — ultimate conclusions — of fact — not the evidence.

1. The finding of a jury in a special verdict should contain only the ultimate conclusions of fact in controversy, and not the evidence to prove them.

Facts — undisputed evidence — established by — special verdict — need not find.

2. A special verdict need not find a fact which is established by undisputed evidence.

Assignments of error — form of questions — predicated on — instructions — jury — merits.

3. It is *held*, for reasons stated in the opinion, that certain assignments of error predicated upon the form of interrogatories and the court's instructions to the jury are without merit.

NOTE.—On what is necessary to make a special verdict good or bad, as the case may be, as such, is discussed in a comprehensive note in 24 L.R.A. (N.S.) 1, on what a special verdict must contain.

The effect of unaccepted tender on lien of a mortgage or pledge is taken up in an extensive note in 33 L.R.A. 231. See also notes in 30 Am. St. Rep. 460, and 77 Am. Dec. 470, on sufficiency and effect of tender.

Tender and deposit — bank — manner of — prescribed by law — effect of — debt — extinguishes — discharge of mortgage — mortgagee — penalty.

4. The tender and deposit in a bank in the manner provided by law, of the full amount due upon the notes secured by a mortgage, extinguishes the obligation, and entitles the mortgagor to a certificate of discharge of the mortgage, and renders the mortgagee liable for the penalty prescribed by § 6749, Compiled Laws, for refusing to execute such certificate of discharge.

Directed verdict — motion for — evidence for jury — properly denied — damages.

5. A motion for a directed verdict in favor of the defendant for a dismissal of the action is properly denied where there is some evidence from which the jury can make a finding of damages in favor of the plaintiff.

Opinion filed January 16, 1917.

From a judgment of the District Court of Hettinger County, *Crawford, J.*, defendant appeals.

Affirmed.

V. H. Crane, for appellant.

In a special verdict, the question, "Did the plaintiff make a tender of the full amount due on the note and secured by the mortgage?" merely calls for a conclusion of law, and not one of fact. *Comp. Laws 1913, § 7632; Russell v. Meyer, 7 N. D. 335, 47 L.R.A. 637, 75 N. W. 262; Lathrop v. Fargo-Moorhead Street R. Co. 23 N. D. 246, 136 N. W. 88.*

The defendant may at the time of a tender merely object to the form thereof. This is sufficient. *Comp. Laws 1913, § 5816.*

The statute is not regarded as imposing a fine or forfeiture, but merely as awarding exemplary damages, although they are the same regardless of the amount of the mortgage. *27 Cyc. 1425, § 5; Comp. Laws, § 7145.*

The common-law penalty for the tort of refusing to discharge of record a mortgage that has been paid, and the penalties provided by said section, are in lieu of exemplary damages. *Swallow v. First State Bank, 28 N. D. 283, 148 N. W. 630; Kronebusch v. Raumin, 6 Dak. 243, 42 N. W. 656; 27 Cyc. 1428; Schumacher v. Falter, 113 Wis. 563, 89 N. W. 485.*

Where a case is submitted for a special verdict, general instructions are not proper. *Morrison v. Lee, 13 N. D. 591, 102 N. W. 223; 35 N. D.—39.*

Lathrop v. Fargo-Moorhead Street R. Co. 23 N. D. 246, 136 N. W. 88.

It is error to inform the jury under what circumstances the plaintiff can or cannot recover. That this is the very thing which the special verdict is intended to prevent is evident from the statute,—the only object of which is to secure from the jury fair and unbiased answers to the questions submitted. *Morrison v. Lee*, *supra*, and cases cited; *Comp. Laws*, § 7632.

The burden of proving tender rests upon the party alleging it. 38 Cyc. 178, D; *Pittsburg Plate Glass Co. v. Leary*, 25 S. D. 256, 31 L.R.A.(N.S.) 746, 126 N. W. 271, *Ann. Cas.* 1912B, 928.

To demand a release of satisfaction when the amount is in dispute constitutes a condition. *Pittsburg Plate Glass Co. v. Leary*, *supra*; *Fields v. Danenhowe*, 65 Ark. 392, 43 L.R.A. 519, 46 S. W. 938.

Jacobsen & Murray, for respondent.

The question of whether or not a tender is made conditionally is for the jury. 38 Cyc. 179; *Clementson*, *Special Verdicts*, pp. 191, 192; *Geisinger v. Beyl*, 80 Wis. 443, 50 N. W. 501; *Gerhardt v. Swaty*, 57 Wis. 24, 14 N. W. 851.

There is no showing that defendant offered any objections to the form of the questions when they were submitted to the jury. Such objection was waived. *Clementson*, *Special Verdicts*, 190, 192, 199; *Gerhardt v. Swaty*, 57 Wis. 24, 14 N. W. 851; *Schultz v. Chicago, M. & St. P. R. Co.* 48 Wis. 375, 4 N. W. 399.

Objections to a tender in payment should be made at the time of the tender, and it should be made clear to the party making the tender the reasons why it is refused. *Kofoed v. Gordon*, 122 Cal. 314, 54 Pac. 1115.

A party cannot remain silent when a tender is made to him and thereafter offer objections. *Oakland Bank of Savings v. Applegarth*, 67 Cal. 86, 7 Pac. 139, 476; *Gauche v. Milbrath*, 94 Wis. 674, 69 N. W. 999.

It is not necessary for the court to submit to the jury questions as to matters upon which the evidence is undisputed. *Clementson*, *Special Verdicts*, p. 194; *Haley v. Jump River Lumber Co.* 81 Wis. 412, 51 N. W. 321, 956; *Russell v. Meyer*, 7 N. D. 335, 47 L.R.A. 637, 75 N. W. 262.

All objections to an offer of payment of money are waived, if the grounds therefor are not stated at the time of the offer. *Kofoed v. Gordon*, 122 Cal. 314, 54 Pac. 1115; *Kronebusch v. Raumin*, 6 Dak. 243, 42 N. W. 656.

The refusal need not be malicious in order to entitle plaintiff to recover. *Swallow v. First State Bank*, 28 N. D. 283, 148 N. W. 630.

This action is not dependent upon the statute. If plaintiff has sustained damages, he may recover them. *Greenberg v. Union Nat. Bank*, 5 N. D. 483, 67 N. W. 597.

"When a special verdict is required, courts should not charge the jury on the general law of the case, further than is necessary to assist in answering each question propounded." *Lathrop v. Fargo-Moorhead Street R. Co.* 23 N. D. 246, 136 N. W. 88; *Clementson, Special Verdicts*, p. 259; *Baumann v. C. Reiss Coal Co.* 118 Wis. 330, 95 N. W. 139.

"Judgments will not be reversed notwithstanding an erroneous instruction, if, from the jury's findings, it affirmatively appears that the verdict was not reached upon the facts to which the instruction applied, or that the instruction was without influence." *Clementson, Special Verdicts*, p. 95; *Elwood v. Saterlie*, 68 Minn. 173, 71 N. W. 13; *Brasen v. Seattle, L. S. & E. R. Co.* 4 Wash. 754, 31 Pac. 34; *Ft. Scott, W. & W. R. Co. v. Jones*, 48 Kan. 51, 28 Pac. 978.

Defendant refused to satisfy the mortgage on demand. Plaintiff was entitled to damages. *Kronebusch v. Raumin*, 6 Dak. 243, 42 N. W. 657.

An honest attempt to pay up a mortgage before foreclosure proceedings are started prevents the accrual of attorney's fees. *Castle v. Castle*, 78 Mich. 298, 44 N. W. 378; 11 Cyc. 77.

Civil actions in this state are commenced by the service, not the issuance, of a summons. *Comp. Laws 1913*, § 7420.

No attorney's affidavit was filed. This is a condition precedent to the taxation of attorney's fees in foreclosure. *Comp. Laws 1913*, § 7792; *Hedlin v. Lee*, 21 N. D. 495, 131 N. W. 390.

The supreme court cannot exercise the functions of the jury. If a verdict is based upon substantial evidence, the findings of the jury are conclusive upon this court. *N. D. Const. art. 86*.

Insufficiency of the evidence to justify the verdict, and excessive dam-

ages appearing to have been given under the influence of passion and prejudice, are separate grounds for a new trial. Comp. Laws 1913, § 7660; *Swett v. Gray*, 141 Cal. 63, 74 Pac. 439.

The strength of a motion for a directed verdict is measured by the horizon of its specification of particulars. The law reasons must be given and stated. *Morris v. Minneapolis, St. P. & S. Ste. M. R. Co.* 32 N. D. 366, 155 N. W. 861; *Kolka v. Jones*, 6 N. D. 461, 66 Am. St. Rep. 615, 71 N. W. 559; *Howie v. Bratrud*, 14 S. D. 648, 86 N. W. 747.

This is due to the court, to enable it to understand and pass upon the motion, and it is due to counsel that he may, if possible, supply the defect or correct the situation, if permitted by the court. *Hanson v. Lindstrom*, 15 N. D. 584, 108 N. W. 799; *Minder & J. Land Co. v. Brustuen*, 31 S. D. 211, 140 N. W. 251; *Yaeger v. South Dakota, C. R. Co.* 31 S. D. 304, 140 N. W. 690; *Davis v. C. & J. Michel Brewing Co.* 31 S. D. 284, 140 N. W. 695.

Incompetent evidence must be shut out at the time it is offered and it is too late to raise the question on motion for a new trial. *McLain v. Nurnberg*, 16 N. D. 145, 112 N. W. 243.

Where a specification fails to point out any elements of damages which the evidence fails to show, it is too general. *Drake v. Great Northern R. Co.* 24 S. D. 19, 123 N. W. 82; *Anthony v. Jillson*, 83 Cal. 296, 23 Pac. 419, 16 Mor. Min. Rep. 26; *Pritchard Rice Mill. Co. v. Jones*, — Tex. Civ. App. —, 140 S. W. 817; *Cummings v. Ross*, 90 Cal. 68, 27 Pac. 62; *Dawson v. Schloss*, 93 Cal. 194, 29 Pac. 31; *Menk v. Home Ins. Co.* 76 Cal. 50, 9 Am. St. Rep. 158, 14 Pac. 837, 18 Pac. 117; *Updegraff v. Tucker*, 24 Cal. 171, 139 N. W. 366; *Taylor v. Bell*, 128 Cal. 306, 60 Pac. 853; *Haight v. Tryon*, 112 Cal. 4, 44 Pac. 318; *Jackson v. Ellerson*, 15 N. D. 533, 108 N. W. 241; *King v. Lincoln*, 26 Mont. 157, 66 Pac. 836.

A mortgage or holder of a mortgage upon payment, or proper tender of payment, must immediately satisfy or release the same upon demand, or suffer damages. *Hall v. Hurd*, 40 Kan. 740, 21 Pac. 585.

CHRISTIANSON, J. This is an action to recover the penalties allowed under the statute for, and the actual damages which plaintiff asserts that he has sustained by, defendant's refusal and neglect to satisfy two

certain mortgages upon chattels and real estate. Upon the demand of the defendant, the case was submitted to a jury for a special verdict. Judgment was ordered and entered against defendant upon such special verdict, and this appeal is from such judgment.

Plaintiff's complaint originally set forth five different causes of action,—two causes of action for the statutory penalties and the actual damages alleged to have been sustained by the plaintiff on account of defendant's failure and refusal to satisfy a chattel and a real estate mortgage; and three causes of action for damages alleged to have been sustained by the plaintiff by reason of defendant's failure to make a certain real estate loan to the plaintiff. At the close of plaintiff's case in chief, the trial court, upon defendant's motion, directed a verdict in defendant's favor upon the latter three causes, and the only matters submitted to the jury were the causes of action based upon defendant's alleged failure to satisfy the chattel and real estate mortgages. These causes involved two elements: (1) The statutory penalty prescribed by § 6749; and (2) the actual damages alleged to have been sustained by the plaintiff by defendant's wrongful act in refusing to satisfy such mortgages.

Plaintiff's complaint alleges that plaintiff, on March 23, 1912, tendered to the defendant the full amount of the principal and interest due on the indebtedness secured by the two mortgages involved herein; that such tender was refused, and that thereupon plaintiff immediately deposited the amount so tendered in the name of the defendant in a bank of good repute within this state, and served notice of such tender and deposit upon the defendant; that thereafter plaintiff presented to the defendant releases of such mortgages for execution, and offered to pay the notarial fees for the proper acknowledgment thereof, but that defendant refused to execute such releases, or in any manner release such mortgages.

The defendant, in its answer, admits that it held the two mortgages against the defendant, but asserts that the mortgages provided for the payment of a statutory attorney's fee in case of foreclosure, and that, prior to the time of the tender by the plaintiff, the defendant had delivered such mortgages to its attorneys with instructions to foreclose the same, and that consequently an attorney fee of \$25, stipulated for in the

mortgages had become due and payable as a part of the amount secured thereby.

The uncontroverted evidence shows that on March 28, 1912, plaintiff's attorney (Murray), called Orr, the cashier of the defendant bank, on the telephone three different times regarding the Swallow notes and mortgages. And while Murray and Orr differ somewhat as to the time of the day when these telephone conversations took place and the exact language used, they both agree that the conversations related to, and that Murray sought to ascertain, the amount due on these mortgages. They also agree that in the first conversation Orr stated that he was busy right then, but would answer later; that in the second conversation, Orr stated that he was still busy, and wanted some more time; and that in the third and last conversation, Orr told Murray to go and see his attorneys, Crane & Stone, as he had placed the mortgages with them for foreclosure. The uncontroverted evidence further shows that shortly after the conclusion of the third telephone conversation, Murray tendered to the defendant bank \$845.80, the full amount then due for principal and interest upon the mortgages; that such tender was refused, and that thereupon Murray, as Swallow's attorney, deposited such moneys to the credit of the defendant, in the First National Bank of Mott, and forthwith caused written notice of such deposit to be served upon the defendant. Orr claimed he had delivered the mortgage against Swallow to attorneys Crane & Stone for foreclosure, before the tender was made, and before any of the telephone conversations were had, and that consequently the attorney's fees allowed by law for foreclosure had accrued, and the amount tendered was insufficient. He further claimed that the tender was not unconditional, but that Murray requested not only satisfaction of the two mortgages, but also the execution of a quit-claim deed for the purpose of releasing a certain loan application which had been recorded against the land. The testimony of Murray, and one Little, who was present at the time the tender was made, is, however, to the effect that the tender was absolute and unconditional. Little says that Murray made the tender in these words: "I hand you this money to pay the Ray Swallow real estate and chattel mortgages."

Appellant's first assignment of error is predicated upon a ruling and certain remarks made by the court during the cross-examination of plaintiff's witness Murray.

The record on which this assignment is based is as follows:—

Q. How long, Mr. Murray, were you over there in the bank?

A. About five or ten minutes, about five minutes.

The Court: The court don't hardly see the purpose.

Mr. Crane: Well, it is a question of good faith.

The Court: A tender is a tender whether it is good faith or bad faith.

Mr. Murray: At this time the plaintiff objects to any further testimony as to the hour of making the tender, as same is incompetent and immaterial, not within the issues.

The Court: I think they have a right to set the hour, but to go into all these details the court don't think it cuts any figure. Objection sustained.

No complaint is made on the ground that the court erred in its statement of the law, but the specific objection urged in appellant's brief is that the remarks of the court were prejudicial, "because the jury might infer that the good faith to which Mr. Crane referred had reference to the tender, as the remark suggests." It is difficult to understand how any person could possibly construe Mr. Crane's remarks in any other manner than they were construed by the court. If the court misunderstood him, or rather if Mr. Crane did not intend to say what his language clearly indicated that he intended to say, it was certainly his duty to correct the erroneous impression which his remark had created. In this case the jury was required to make findings upon certain specific questions of fact, and we are wholly unable to see wherein the remarks could have influenced the jury in arriving at such findings.

Among others, the court submitted the following question to the jury: "Did the plaintiff make a full and unconditional tender to the defendant of the amount due on the note secured by the mortgages described in the complaint?" It is asserted that this question is improper in this that it calls for a conclusion of law, and not of fact. By a special verdict a jury should find only the ultimate facts in controversy. The findings should contain only the conclusions of fact, and not the evidence to prove them. *Russell v. Meyer*, 7 N. D. 339, 47 L.R.A. 637, 75 N. W. 262. No objection was made to this form of the question. The court fully instructed the jury with respect to the matter referred to in this ques-

tion, and we are agreed that no error was committed in the submission thereof to the jury.

Appellant also asserts that the question was incomplete in this that it did not require the jury to make a finding as to whether the tender had been kept good by a subsequent deposit in a bank of good repute. This objection is wholly without merit because the undisputed evidence shows that the money tendered was deposited immediately after the tender had been refused, and that notice of such deposit was served upon the defendant, and that the defendant subsequently received the money from the bank, where it had been deposited. A special verdict should cover only the ultimate facts in controversy. And such verdict need not find a fact which is established by undisputed evidence. 38 Cyc. 1924; *Cooper v. Insurance Co. of Pa.* 96 Wis. 362, 71 N. W. 606; *Salzer v. Milwaukee*, 97 Wis. 471, 73 N. W. 20. See also *Russell v. Meyer*, *supra*.

The defendant also asserts that the court erred in submitting to the jury the following question: "Did the defendant in good faith demand the payment of the attorney fee for the foreclosure of the mortgage at the time of the tender, and was such tender refused on that ground?" The complaint is that the question embraces two propositions,—good faith of the demand and the ground of the refusal.

It is true that a question for a special verdict should be plain, single, and direct. And questions framed in the disjunctive or alternative have been criticized for the reason that they introduce an element of uncertainty into the verdict. See *Geisinger v. Beyl*, 80 Wis. 443, 50 N. W. 502. A question formed in the conjunctive does not, however, introduce the same element of uncertainty into the findings as a question formed in the alternative or disjunctive. In the case of a disjunctive question a categorical answer may apply to either one of the two alternatives presented by the question, and consequently an element of uncertainty frequently arises. In the case of a conjunctive question (while we do not necessarily approve of the form of the question under consideration) a categorical answer will either affirm or negative both, or all, propositions submitted in the question.

The defendant in no manner challenged the sufficiency or propriety of either the question or the answer thereto in the trial court. The

objection is first urged on appeal to this court. Under the testimony of Orr, the cashier of the defendant bank, we are unable to see how defendant could possibly have been prejudiced or denied a fair trial by reason of the form of the question.

Error is also assigned upon the submission of the following question: "Did the defendant execute a power of attorney and deliver the same to its attorneys prior to the time of the tender, if any was made?" The jury answered this question in the negative. Defendant asserts that this question was immaterial under the court's instructions. Admitting this to be so, no reversible error was committed, as a verdict is not invalidated because the jury makes findings on immaterial matters, where such findings in no way qualify, limit, or affect the findings upon the material questions. *Guild v. More*, 32 N. D. 474, 155 N. W. 44.

In its instructions to the jury with respect to the first interrogatory (the interrogatory regarding tender) the court said in part: "If you believe from the evidence that an unconditional tender was made of the full amount due under the mortgage, then your verdict should be in favor of the *plaintiff*, and if there was a conditional tender only then that is not sufficient, *then your verdict should be for the defendant.*" The words which are italicized are claimed to be especially objectionable. As the language shows, this instruction related solely to the question of tender. Upon this question there was a square conflict in the evidence. In fact this constituted the principal question in dispute between the parties upon the trial. The jurors could not possibly have misunderstood the contentions of the parties. If possessed of any intelligence whatever they must have known that the plaintiff claimed that he made an unconditional tender, while the defendant claimed that the tender was conditional. Intelligent men must have known whether their answer to this question was a "verdict" or finding in favor of the contention of the plaintiff or in favor of the contention of the defendant. The instruction could not possibly be prejudicial.

It is also asserted that the court erred in instructing the jury that the mere execution and delivery of a power of attorney in a mortgage foreclosure is not sufficient to attach the statutory attorney's fee for foreclosure. As already stated, the jury found that the power of attorney had not been delivered when the tender was made. In view of this finding it is immaterial whether the instruction is correct or not. This

judgment rests on the facts found by the jury, and the conclusions of law drawn therefrom by the court. Comp. Laws § 7632. We doubt the propriety of this instruction, but we can conceive of no way in which defendant could have been prejudiced thereby.

It is also asserted that the evidence is insufficient to sustain the verdict. This assignment is based upon the court's ruling in denying defendant's motion for a directed verdict.

Appellant contends that plaintiffs failed to prove by "full, clear, and satisfactory" evidence an unconditional tender. As we have already stated, the evidence on this issue was in conflict. The weight of the evidence and credibility of witnesses was for the jury, and its findings are binding on this court. *Erickson v. Wiper*, 33 N. D. 193, 157 N. W. 603.

Appellant further contends that there was no competent evidence of damages. In so far as the penalties claimed for failure to release the mortgages are concerned, no evidence of damages was required. The tender and deposit in the manner provided by law of the full amount due upon the note secured by the mortgages extinguished the obligation (Comp. Laws, §§ 5800, 5815, 5819; *Brown v. Smith*, 13 N. D. 580, 102 N. W. 171) and entitled the mortgagor to a satisfaction of the mortgages. *Kronebusch v. Raumin*, 6 Dak. 243, 42 N. W. 656. Under the facts as found by the jury the defendant refused to satisfy the mortgages upon plaintiff's demand, although the debt secured thereby had been fully paid, and such refusal was based upon an alleged ground which the jury said did not exist. Defendant admits that some actual damages were proved. Consequently, the court properly refused to direct a verdict in favor of the defendant for a dismissal of the action. *Erickson v. Wiper*, *supra*. It is asserted, however, that the damages found are excessive. This would constitute a proper ground for a new trial. Comp. Laws 1913, § 7660. In this case no such motion was made, nor did defendant in any manner challenge the verdict in the court below. Consequently, the finding is binding upon him in this court. See *Guild v. More*, 32 N. D. 475, 155 N. W. 44; *Erickson v. Wiper*, *supra*; 38 Cyc. 1931, see also *Morris v. Minneapolis, St. P. & S. Ste. M. R. Co.* 32 N. D. 366, 155 N. W. 861.

The questions of fact in this case were submitted to a jury, and the facts found by the jury entitled plaintiff to the judgment rendered. A

former jury, also, found against defendant upon the facts, but a new trial was ordered for error in the instructions. See *Swallow v. First State Bank*, 28 N. D. 283, 148 N. W. 630.

We find no error justifying us in ordering a new trial. Consequently the judgment must be affirmed. It is so ordered.

MOHALL STATE BANK, a Corporation, v. DULUTH ELEVATOR COMPANY, a Corporation, and Monarch Elevator Company, a Corporation, Its Successor.

(161 N. W. 287.)

Chattel mortgage — holder of — elevator agent — mortgagor — delivery of grain — covered by — mortgagee — sale induced by — permits payment — by agent — to mortgagor — silence as to mortgagee — remaining — demand for grain — thereafter — by mortgage — estoppel.

Where the holder of a chattel mortgage is requested by an elevator agent to induce the mortgagor to deliver grain covered by such mortgage to the elevator operated by such agent, and subsequently stands by and sees the grain sold and delivered to such agent, and permits payment therefor to be made to the mortgagor without informing the purchaser of the mortgage lien, and makes no demand for either the grain or the proceeds thereof until more than two years after the grain has been sold and delivered, he is estopped from asserting any lien under such mortgage against the elevator company.

Opinion filed January 20, 1917.

From a judgment of the County Court of Renville County, *Crewe, J.*, plaintiff appeals.

Affirmed.

Grace & Bryans, for appellant.

An action for conversion may be brought at any time within six years after the date of the conversion. Comp. Laws 1913, § 7375.

The demand here made for the grain in question was made within a reasonable time. There is no conversion until demand and refusal. Demand made on the agent in charge is a sufficient demand on the defendant companies. *Sanford v. Duluth & D. Elevator Co.* 2 N. D. 6, 48

N. W. 434; Seymour v. Cargill Elevator Co. 6 N. D. 444, 71 N. W. 132.

Estoppel is not pleaded by defendants. 38 Cyc. 2075, and cases cited under note 50.

The value of the grain is established as of the date of the conversion. This is sufficient. Citizens Nat. Bank v. Osborne-McMillan Elevator Co. 21 N. D. 335, 131 N. W. 266; Comp. Laws 1913, § 7168.

Purcell & Divet, for respondent.

Where a party plaintiff fails to make out a case, the court may—often does—without waiting for a motion, direct a verdict. “The fact that some particular ground is not stated in the motion, in such a case, is of no moment, if the motion is correctly granted. Ruehl v. Lidgerwood Rural Teleph. Co. 23 N. D. 6 (18), L.R.A. —, —, 135 N. W. 793, Ann. Cas. 1914C, 680.

The amount involved in this controversy exceeds the jurisdiction of the county court. This is a jurisdiction concerning the subject-matter, and cannot be conferred by consent. It may also be first challenged in the supreme court. Plumket v. Evans, 2 S. D. 434, 50 N. W. 961; Finn v. Walsh, 19 N. D. 69, 121 N. W. 766.

No remission of amounts can be made to vest the court with jurisdiction after the commencement of the action. Gillett v. Richards, 46 Iowa, 652; Plumket v. Evans, 2 S. D. 434, 50 N. W. 961; Albaugh Bros. Dover Co. v. White, 22 Ann. Cas. 1284, note.

Plaintiff waived its lien, and is estopped to maintain conversion against defendant—one of the principal officers of the plaintiff bank, at the time of the delivery of the grain to defendant, had full knowledge of such delivery, knew of the mortgage to his bank, was present when the grain was delivered, and took no steps to apprise defendant of the fact that the bank had a claim on the grain, but remained silent. No demand for the grain was made in any reasonable time. Pickert v. Rugg, 1 N. D. 230, 46 N. W. 446; First Nat. Bank v. Minneapolis & N. Elevator Co. 8 N. D. 430, 79 N. W. 874.

The acts of the plaintiff show a clear intent to allow the mortgagor to dispose of the property, and amount to a waiver of the lien of the mortgage. New England Mortgage Secur. Co. v. Great Western Elevator Co. 6 N. D. 407, 71 N. W. 130; Peterson v. St. Anthony & D.

Elevator Co. 9 N. D. 55, 81 Am. St. Rep. 528, 81 N. W. 59; Jones, Chat. Mortg. § 466; Thompson v. Blanchard, 4 N. Y. 303.

CHRISTIANSON, J. Plaintiff seeks to recover of the defendant damages for alleged unlawful conversion of grain. The undisputed facts are as follows: One Sleeper, the president and an active officer of the plaintiff bank, was the owner of certain lands in Renville county. In 1912 he leased these lands to one Campbell. Under the terms of the lease the grain produced was to be divided in the fall of 1912 between Sleeper and Campbell.

Campbell executed and delivered to the plaintiff bank a chattel mortgage upon his share of the grain. In the fall of 1912, the agent of the defendant elevator company saw Mr. Sleeper and requested that Sleeper use his influence with Campbell to induce him to sell his share of the grain to the defendant. Sleeper, who as already stated was the owner of the land and president of the bank and one of its active officers, had personal knowledge of the fact that Campbell hauled his share of the grain to the defendant elevator company. In fact, he admits that he was present at the time a considerable portion thereof was delivered at the elevator of the defendant. He admits that he at no time informed the defendant that the plaintiff had a mortgage upon this grain, although he admits that he had personal knowledge of the existence of such mortgage. The evidence further shows that the chattel mortgage of the plaintiff bank also covered certain other personal property, and that on November 24, 1914, the plaintiff released two mules covered by this mortgage. The defendant had no personal knowledge or notice of the existence of the chattel mortgage, and no demand was made upon it by the plaintiff until the 27th day of February, 1915, when a demand was made upon the defendant by registered mail, and subsequently about April 15, 1915, written demand was served upon its agent at Mohall. The only evidence of value offered by the plaintiff was the market value of the grain in March and April, 1915. At the conclusion of plaintiff's case in chief the court directed a verdict for the defendant for a dismissal of the action, and the plaintiff has appealed from the judgment.

The sole question presented on this appeal is whether under the undisputed facts, defendant was entitled to a directed verdict. It is a maxim of our jurisprudence that "one must not change his purpose to

the injury of another" (Comp. Laws, § 7246). And "when one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer" (Comp. Laws, § 7277). And estoppel is fundamentally based upon the idea that "he who is silent when conscience requires him to speak shall be debarred from speaking when conscience requires him to keep silent." 16 Cyc. 681. See also *Branthover v. Monarch Elevator Co.* 33 N. D. 454, 156 N. W. 927.

By applying these principles to the case at bar, we reach the conclusion that plaintiff is estopped from asserting its mortgage lien against the defendant herein.

Judgment affirmed.

GRACE, J., being disqualified, did not participate.

JOHN KUPFER and Harland Kupfer v. JAMES McCONVILLE.

(161 N. W. 283.)

Contract — nonperformance — recovery — work and labor — contract price — failure to perform — conditions precedent — recovery cannot be had.

1. Where one makes a contract with another to perform certain work at a stated contract price, and fails to perform or carry out his part of the contract and perform precedent conditions incumbent on him to perform, no recovery can be had on such contract for the contract price by reason of such nonperformance.

Mechanic's lien — contract — based on — performance — must be — when lien attaches — foreclosure.

2. Where a mechanic's lien is claimed by reason of the alleged performance of a certain contract, and it is found there was no performance of such contract, such mechanic's lien never attached or became a lien, and therefore there is no lien upon which foreclosure can be had.

Opinion filed January 22, 1917.

Appeal from a judgment of the District Court of Dickey County,
Hon. *Frank P. Allen*, J. Plaintiffs appeal.

Affirmed.

F. J. Graham and *E. E. Cassels*, for appellants.

A contract must be so interpreted as to give effect to the mutual intention of the parties at the time, so far as same is lawful and ascertainable. Comp. Laws 1913, § 5896.

The intention of the parties to a written contract must, as a general rule, be ascertained from the instrument itself. Comp. Laws 1913, § 5899.

The whole contract must be real and considered together. Comp. Laws 1913, § 5901.

The contract must receive such a construction as will make it lawful, operative, and definite and capable of being carried out. Comp. Laws 1913, § 5903.

But a contract may be explained by reference to the circumstances under which it was made and to its subject-matter. Comp. Laws 1913, § 5907.

W. S. Lauder, for respondent.

Where a trial *de novo* is asked, the appellant must specify in his statement of the case that he desires a review of the entire case in the supreme court, and the trial judge's certificate must state that the statement contains all the evidence and proceedings had on the trial. Supreme Court Rule 31; Rev. Code 1905, § 7229; Comp. Laws 1913, § 7846; Laws 1913, chap. 131.

The rule that extrinsic evidence cannot be offered to vary the terms of a written contract has no application here, because the contract was admittedly partly written and partly oral, and especially where the oral evidence does not change the writing, but adds to and explains it. 17 Cyc. 741 et seq. and note.

GRACE, J. This action is one for the foreclosure of an alleged mechanic's lien, and appellant desires a review of the entire case in this court, and the case is here for trial *de novo*.

The complaint in the case is to the effect that on the 13th day of September, 1913, plaintiffs and defendant entered into a contract wherein the plaintiffs agreed to dig and sink a well on the northeast quarter of section 4, township 129 and range 65, in Dickey county, North Dakota, at the agreed price of \$700, to be paid when the well was completed; said well was to furnish water reasonably clear and suitable for use with

a pump, in case water would not flow from said well. The well was to be piped with standard pipe of 2 inches in diameter.

The plaintiffs commenced digging said well on November 1, 1913, and completed the same on November 25, 1913, and, at the time of the making of said contract for digging said well, defendant was the owner of the land described in the complaint; that on the 24th day of December, 1913, within ninety days of the completion of said well upon said land, the plaintiffs duly filed in the office of the clerk of the district court in Dickey county, a just and true account of the amount claimed to be due plaintiffs. That on the 24th day of December, 1913, the plaintiffs gave personal notice in writing to the defendant of their intention to foreclose such lien; that the plaintiffs were at certain other costs for preparing and filing said mechanic's lien, and the notice aforesaid and the costs of serving same, and demanded judgment for the sum of \$700, and for the cost of filing their claim and preparing and serving the notice, and demanding that their account so filed and claim of lien be adjudged a lien upon the land described in the complaint; that the premises be sold and the proceeds applied to the discharge of the demand of the plaintiffs. To which complaint the defendant answered in effect, admitting the partnership of the plaintiffs, and further admitting that on the 13th day of September, 1913, plaintiffs and defendant entered into a contract wherein plaintiffs agreed to dig or sink a well upon the real estate described in the complaint at the agreed price of \$700 to be paid at the time the said well was completed according to the terms of said contract or agreement; said well was to furnish water in reasonable amounts and in all ways suitable for stock and domestic purposes. That the plaintiffs agreed to sink the well to sufficient depth to reach the artesian water level in the vicinity of the land in question for the sum of \$700; that the plaintiffs agreed to furnish to defendant an artesian well or a well that would flow water by its own force, provided that such a well could be obtained by going down to the depth at which artesian flow wells in that vicinity were sunk; and that in the event that an artesian flow well could not be obtained by going down to said level, then the well should be equipped with a pump so that the water could be raised by means of a pump.

Defendant further alleges that the said plaintiffs did not sink said well to the depth to which artesian flow wells were sunk in that neigh-

borhood, nor within 100 feet of said depth, and that plaintiffs therefore have not completed their said contract. Defendant further alleges that he never accepted said well as a completed well, and has never agreed to pay for the same, and that the said well has never been completed in accordance with the terms and conditions of said contract.

Defendant further enters a special denial to every allegation not admitted. Defendant further by way of counterclaim, in his answer to the complaint, sets up the value of certain services, the aggregate of which are claimed to be worth \$100, and concludes his answer with a prayer for judgment that the action be dismissed and that he have judgment for the amount of his alleged counterclaim and costs.

We will state the facts first, which appear to be undisputed, and, second, state the facts which appear to be in dispute, so that it may be more convenient to examine the record and consider the testimony with regard to those facts which appear to be somewhat in dispute. The facts which we think are admitted are as follows:

Admitted Facts.

That on the 13th day of September, 1913, at Ellendale, N. D., the defendant signed the following agreement and delivered the same to plaintiffs:

Well Contract.

This agreement, made and entered into this 13th day of September, 1913, by and between Kupfer Bros., of Ashley, N. D., party of the first part, and James McConville of Forbes, N. D., party of the second part.

Witnesseth, For and in consideration of the payment of the sum of \$700, to be paid the said party of the first part by said second party in the manner hereinafter set forth, the said party of the first part hereby agrees to obtain for said party of the second part a *reasonably clear pump or flow if it will of 2 inches in diameter*, to be piped with standard pipe and surface pipes of such well to be sunk on the following premises, to wit: sec. 4-129-R. 65.

Said first party agrees to begin the sinking of said well before 15 Sept. and complete the same as soon thereafter as reasonably possible drilling day and night until completed. Said first party agrees at his own expense to furnish all machinery, labor, gasoline and other articles —Said second party agrees to transport the machinery and materials

from Morriscourt—to place of sinking said well and furnish all water for use in said work, and board the men while said work is in progress, and during all of the time of sinking said well the second party agrees to pay said first party the sum of seven hundred . . . in cash, and agrees to pay the balance thereof as follows: . . .

Said party of the first part guarantees well for one year.

The terms of this agreement shall be binding upon the heirs, executors and administrators of the said parties.

Signed in presence of

.....

James McConville.

Plaintiffs commenced to work upon said well some time after the 13th day of September, 1913. The agreed price for drilling and constructing said well was \$700, to be paid by the defendant; that the defendant was the owner in fee of the northeast quarter of section 4-129-65; that said well was guaranteed for one year; that the said well sunk upon defendant's said land by the said plaintiffs was only to the depth of 1,315 feet.

There remains in dispute four questions of fact: 1. Relating to the character of the contract as to whether the whole contract was in writing and consisted wholly of exhibit A, or whether the contract was partly in writing and partly verbal. 2. What, if any, depth was agreed upon as to which said well would be dug, drilled, or constructed. 3. What was the character of the well as to whether it should be a flow well or a pump well. 4. What, if any, was the agreement with reference to the quantity and quality of water such well was to produce.

Referring to the first question in regard to the first disputed fact as to whether all the contract was contained in exhibit A or as to whether that contract was added to, or modified at the time or subsequent to the date of its execution, those are matters which the testimony of the witnesses, in view of all the circumstances of the case and the character of exhibit A, must determine. A very casual inspection of exhibit A will disclose that it is a very ambiguous and meaningless instrument. A great deal of the subject-matter which would appear to be necessary in such contract appears, from a mere inspection of exhibit A, to have been wholly omitted. We may assume that exhibit A intended to set

forth the conditions in regard to the building and construction of a well, but uncertainty marks almost every portion of exhibit A.

Of the main elements necessary in said contract, only three seem to have been set forth reasonably clear in exhibit A; namely, the parties to the contract, the price to be received for the construction of said well, and that the well was to be guaranteed for a year. Further than this most all of the necessary elements necessary to determine the intention of the parties are missing. Exhibit A standing alone and without testimony to explain it does not show to what depth the well was to be dug, nor what standard was taken, if any, as to which the depth of the well should correspond, or whether or not the well should be a pump well or a flow well, or under what conditions the defendant would be required to accept the pump well or on what conditions were plaintiffs required to furnish a flow well. These elements, mostly all, if not all, were necessary to be present in this contract if it should be an intelligible, understandable, and enforceable contract in equity. The plaintiffs deny in their testimony any other contract or agreement except that set forth in exhibit A. The defendant, on the other hand, testifies that exhibit A does not contain all the terms of the contract with reference to the well, but, at the time of signing the same and thereafter, he fully stated all the terms of such contract to the plaintiffs, as is shown by his testimony on pages 57, 58, and 69 of the transcript, the same testimony thereon is pertinent to each disputed facts numbered 1 and 2. Defendant claims the terms of the contract which he really made with the plaintiffs for the construction of said well were the same as the terms of a proposed well contract between him and one Valentine, another well-digger; the terms of the proposed contract with Valentine for the construction for defendant of a well, the defendant claimed, are the same and were taken as the standard for the construction of the well for which he contracted from plaintiffs.

The testimony of defendant as to the terms of his proposed contract with Valentine is as follows:

Q. What kind of a well did you agree to get from Valentine?

A. He agreed to put me down a 2-inch well; that is the kind I wanted on the place.

By the Court: State exactly what you said to these gentlemen in this conversation; don't tell me, for instance, that you told them just ex-

actly what Valentine agreed to do; as near as you can, state just what you said to them and just what they said to you?

A. I told them I was wanting a well down as deep as Valentine agreed to put it down for me, and that would be average around, around, that my land was at least 50 feet higher than McGannon's, and that I wanted a well down that deep, that deep on my farm, and they asked me what price he was charging me, and I said \$550, he told me \$550, and they said they couldn't put down a well at that price; that they would have to—they wouldn't put it down any less than \$750; I said I wouldn't give that price, that I would go back and see Valentine before I would do that; so they come down \$50; they said they would put it down for \$700 and I said I wouldn't give it, and so finally that evening, that was Sunday, I thought it over and the renter on the place was kicking about water—he had to haul water, there wasn't enough in the well I had there to supply them, and I come to town and I told them that I would bargain to put down a well according to the agreement that I had made with Valentine, to the depth of McGannon's well and 50 feet deeper on a level with the artesian basin; that I was willing to take it whether it flowed or I had to pump it; I didn't care if they had dug it down that deep.

Q. Now had you been informed how much higher you were than McGannon's place?

A. I was informed.

Q. Who told you?

A. Valentine that spring when he came up to take the job.

Q. State whether or not you had had an instrument that showed the altitude?

A. Yes, I rode around with him, around the country for 3 or 4 miles; he told me the difference; he also showed me what it was, and said I would have to go down to that depth to get.

Q. By the Court: Who told you this?

A. Valentine.

Q. You stated to the plaintiffs just what Valentine had said?

A. I did state that yes, what that agreement was.

Q. By the Court: When you told them that—what your agreement was with Valentine, and that the well you wanted was to be as deep as McGannon's and 50 feet more, what did they say to that?

A. They said that they would go down and get me water and give me satisfaction, and that they gave satisfaction every place they went.

Q. What did you say to that?

A. Well, I said that was all I wanted, when they went down to that depth I was willing to take the well whether it flowed or pumped. (See pages 57 and 58 of the transcript.)

Q. I show you contracts exhibits "A" and "B;" do you remember signing something like that in Walker's office?

A. Yes.

Q. That is your signature to exhibit "A?"

A. Yes.

Q. And this is your signature?

A. Yes.

Q. State whether or not you read that over carefully before you signed it?

A. I did not. I couldn't see what was going into that contract; I told them I was not going on that contract altogether I wanted the depth of the well as deep as McGannon's well and I said 50 feet deeper, and I was willing to take whatever I got. (See transcript page 68.)

Q. What did you say to him at the time you signed it?

A. Well, I told him I wasn't going on that contract altogether, for I wanted a well dug the depth of McGannon's well, and I called for that all the time, and he said he would go down and get water if it was there, and give satisfaction; that was what I was looking for.

Q. By the Court: When was it you said that?

A. I said that after them papers was signed.

Q. By the Court: Did you say it before the papers were signed?

A. Yes I did; I did say it all the time.

Referring now to disputed fact number 2, pertaining to the depth that J. C. McConville's well was to be, the testimony of McGannon regarding the depth of his well (McGannon's well which well defendant claims was to be the standard of depth of his (defendant's) well, except defendant's well was to be 50 feet deeper) is as follows:

Q. Are you acquainted with Kupfer Brothers, the plaintiffs?

A. Yes.

Q. If you know, state whether they were at your house about the time they commenced work?

A. They were.

Q. Do you know whether or not they had yet been to McConville's place?

A. I don't know only what I had heard—I didn't see them there.

Q. Did you see them when they were at your place?

A. Yes.

Q. Did you have a talk with them?

A. Yes.

Q. Tell the court what that talk was?

A. Harlan came in an automobile with another man with him by the name of John Hoffman, and they stopped in my yard, and I came forward and they asked me how deep my well was, and I says that well is somewhere over 1,400 feet I believe. He says, isn't it a fact that that well is pretty deep, I says it is—it seems that way; then the three of us walked to where the tank, where the water was flowing into the tank, and he says this water is, seems to be a weak flow, and I explained to him that it was piped—that it wasn't all going to one place, and so that was all the conversation we had at that time.

Q. Now, state whether or not you heard McConville ask the plaintiffs at any time at his place as to how deep the well was?

A. I did.

A. I did one day at the noon meal, he asked them that and they said they didn't know. (See pages 83 and 84 of the transcript.)

The plaintiffs' testimony was to the effect that the only contract made in regard to the digging of said well was that set forth in exhibits "A" and "B," and they deny the conversation and statement of defendant with regard to the depth of which they were to go, that is 50 feet deeper than McGannon's well.

Referring to the disputed facts numbered 3 and 4, they may be grouped in one analysis and the testimony considered with reference to both at the same time.

John Kupfer, one of the plaintiffs, testified as follows:

Q. How many feet deep was the well?

A. Well, it figured up to be about 1,370 feet.

Q. After putting in these finishing pipes, then what did you do?

A. Well then we rigged it up for to pump it.

Q. And did you put a pump on?

A. No, we put a cylinder in and our rods and went to pumping with the machine.

Q. Went to pumping?

A. Yes.

Q. How long did you pump?

A. Well, we got to pumping Sunday and we pumped until Tuesday at two o'clock.

Q. And what kind of water was coming from there?

A. Why, a while before we quit it was nice and clear, and pumped a nice stroke, we satisfied ourselves on that.

Q. About how much water did you pump an hour?

A. Why, I couldn't say just how much we pumped—we didn't measure how much we pumped; we just knowed the pump pulled a stroke and pulled it steady right along.

Q. Did you see McConville about that time?

A. Yes I saw him.

Q. Did you talk to him about this pumping?

A. Well, I didn't have much to say to him about the pumping. (See pages 6 and 7 of the transcript.)

Harland Kupfer testifies as follows:

Q. Do you know who was working on that well besides yourself while you were there?

A. Yes, there was Bradford and my brother and John Hoffman.

Q. Were you there when they struck this water vein, rock, which is usually called the artesian basis?

A. Well I was there—not when they struck it.

Q. Where was the drill with reference to the artesian basin at the time you came on?

A. They had just gone through the basin.

Q. How long did they drill after they got through the basin?

A. I should judge probably an hour and a half.

Q. Then what did you do?

A. We quit drilling.

Q. Tell the court everything that was done?

A. We went through the basin and of course when you get through the basin you get hard—get what is called the solid sandstone, and the bit won't go—it is practically sandstone and it just merely eats the bit up, and sometimes you will get down a little, 3 or 4 inches, and maybe again you will be practically four or five hours.

Q. Tell the court what you done, successively, until you got through?

A. Then we quit and started to finish up—take up the drill line and put in the casing, the two inch pipe.

Q. Keep on, tell what you did until you got through?

A. We put the 2-inch pipe down—after we got the tool out—we put the 2-inch pipe down and then put down the cylinder, Eureka cylinder, 2-inch cylinder, I think it was a 10-inch stroke, Eureka cylinder, most of them are supposed to be 12-inch stroke, and we started pumping.

Q. How long did you pump?

A. We kept pumping of course—at first the water wasn't clear, but we kept on pumping until the water was nice and clear and pumped a full stroke, about forty-eight strokes to the minute, a 10-inch stroke.

Q. Was there plenty of water?

A. There was plenty of water there so we pumped out a large pond there that covered a spot nearly as large as this building with the water we had pumped out of the well. Of course after I got the pump going a little and felt that the well was perfectly allright I goes in to McConville, and told him we had a good well out there, and if he wanted me to, I would take his engine, which hadn't been used for probably several years, and I would fix it up in running condition and put the pump on and furnish the gasolene, and pump the well until he was thoroughly satisfied that the well was all right.

Q. What did he say?

A. Well, he said he didn't want no pump and he was going to have a flowing well if it cost him several thousand dollars.

Q. What did you say?

A. I told him I could probably get a flow if I went down to the artesian water, and he wanted to know how much we wanted a foot to go on, and I told him \$2 a foot. (See pages 33 et seq., transcript.)

At the bottom of page 60 and the top of page 61, regarding the quantity of water said well would furnish, the defendant testified:

"And that night they put in a cylinder pump, as they call a cylinder, a double cylinder, and they went to work pumping and they worked all night I suppose with the pump—I don't know, I went to bed, but the next morning they were pumping—still jabbing with the rods, splashing up and down with the rods, and there was a little water over the edge of the pipes—enough, not enough to wet the pipe, and they come in and called—he called this Cal, the biggest fellow, Harlan and he got up and he went to the telephone, etc."

There is a great deal of other testimony in the case of different witnesses, all of which has been more or less carefully considered, regarding the different matters which came up for discussion during the trial of said case, such as the fact that there were several artesian wells in that vicinity which were flowing and several artesian wells in that same vicinity which were not flowing, giving the names of the respective parties.

We have quoted from the testimony at some length, and read with considerable care the transcript referring to the important elements of this case.

The trial court heard all the testimony in this case, and all questions of fact were submitted to him. He saw each of these witnesses on the stand, had an opportunity to observe their demeanor, and was in a more advantageous position to determine the credit to be given to the testimony of the respective witnesses than we. There is severe conflict in some of the testimony, but considering the vagueness and uncertainty of the contracts marked exhibits A and B, the ambiguity of the same, and in a large sense its meaningless phrases, and considering further that the object of this arrangement between the plaintiffs and defendant must have been for the purpose of obtaining for defendant a well, either an artesian flow well or, if that could not be obtained, a pump well which would supply water for defendant's use upon his farm.

We feel justified in agreeing with the trial court in regard to the facts in this case, and we do agree with the findings of fact of the trial court. There yet remains but the questions of law, which we now proceed to discuss. The plaintiffs in this case have relied wholly and entirely upon exhibits A and B, both exhibits being the same instrument, to recover in this case. Exhibits A and B are the so-called "well contract." By the mere inspection of the said well contract hereafter re-

ferred to as exhibit A, it will be seen that it is without any question an ambiguous, uncertain, and almost meaningless instrument. The plaintiffs, however, rely wholly and entirely so far as they are concerned, upon exhibit A to obtain the relief demanded by their complaint. The plaintiffs themselves in their brief in this action, filed with this court on page 15 thereof, referring to exhibit A as follows: "It is evident that it is inartistically and negligently drawn and by one who was not used to drawing contracts, but, in view of the surrounding circumstances and the situation of the parties and the matters to which it relates and its purposes and object, the question to be determined is whether, from the writing itself and viewed in the light of the circumstances under which it was made, the real intention of the parties can be determined from it. In other words, does the instrument, taken in its entirety, giving effect to all its parts, import a binding agreement? The parties and the consideration to be paid by the defendant are set forth with sufficient certainty, and there is no controversy in relation to those matters. The uncertainty arises out of the language used as to the *principal object of the contract*, but it clearly appears from the circumstances under which the writing was made and the matters to which it relates, including all the negotiations between them, and that it related to the digging of an artesian well." It is thus seen, even from the standpoint of the plaintiffs relying as they do entirely upon exhibit A as being the whole contract between plaintiffs and defendant, that they must also refer to the circumstances and the matters to which it relates and the negotiations between the parties in order to give any real and definite meaning to exhibit A, that is, standing alone, unexplained and unassisted by proof of facts outside of the contract. Exhibit A really has no plain meaning, and is and must be admitted to be exceedingly uncertain. Its uncertainty as to the depth of the well, its uncertainty as to the quality and quantity of water, must be admitted.

Referring now to the defendant's version concerning the making of this contract, and while it is the general rule that oral testimony is not admissible to vary the terms of a written instrument, the case under consideration is not such a case. There is no attempt to vary any of the terms of the contract which are set forth in exhibit A. There is no attempt to introduce oral testimony to vary the price or the time of pay-

ment, nor show that there were any other parties to the contract. The parol or extrinsic testimony was introduced for the purpose of proving what were the terms of the contract which were omitted from it, and which when omitted from said contract exhibit A would leave exhibit A ambiguous and meaningless.

The testimony of defendant shows that he claims he made certain conditions as to the depth and kind of a well that he should have at the time exhibit A was signed, and also before and after it was signed, made the same conditions to plaintiff, and under all the circumstances in the case and by reason of the ambiguity and uncertainty of exhibit A, we think the trial court did not err in admitting parol and extrinsic testimony to show what was the agreement as to the material element of such contract agreed upon between the parties at the time the contract was made or thereafter, but which were not inserted in the contract. Assuming, then, that the testimony of all the witnesses who testified to what the contract really was should be taken together in connection with exhibit A, and then assumed to be the contract between the plaintiffs and defendant. Then the question arises, Can recovery be had upon this contract even after the terms of the whole contract have been made more certain and definite by parol and extrinsic testimony? We think not, for the reason that the plaintiffs have wholly and entirely failed to show a compliance with the contract, either in the form of exhibit A alone or even as modified by the testimony of the defendant and McGannon or any other person testifying in his behalf.

"If a party by his contract charge himself with an obligation possible to be performed he must make it good unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him." 3 Sutherland, Damages, § 686.

"Plaintiff must show performance of conditions precedent before he can recover on the contract." See 9 Cyc. 761 et seq.

"A party who sues on a special contract to recover compensation alleged to be due on its performance must show performance." 9 Cyc. 757, 759.

The trial court in its findings of fact found that the plaintiffs agreed to sinking a well for the defendant 50 feet deeper than the well belonging to said McGannon, and that if a flow well could not be obtained by

going to the depth stated then the plaintiff should furnish to defendant a pump well that would furnish water suitable for stock and domestic purposes and in reasonable quantities, and that McGannon's well was 1,400 feet, and that the well dug by defendant was only 1,315 feet deep, that plaintiffs did not furnish the defendant a flow well, that the plaintiffs guaranteed the well for one year, that plaintiffs did not furnish defendant any kind of a well that furnished suitable water for stock and domestic purposes for one year; that plaintiffs therefore did not comply with the terms and conditions of their agreement.

Adopting the findings of fact of the trial court, which we do, there was then an entire failure on the part of the plaintiffs to perform the conditions precedent which they were under obligations to perform before they could recover for the agreed price of such well, and most especially before they could come into a court of equity and ask for the foreclosure of a mechanic's lien which was filed to secure said alleged mechanic's lien. It would appear that the plaintiffs have wholly failed to make proof of the performance of the precedent conditions, and therefore must be denied any relief in this case. The plaintiffs made application for an order to show cause in the supreme court in this case, which came on to be heard herein, why said case should not be returned to the district court for the purpose of taking more testimony therein with regard to certain matters, which is denied. For the reasons hereinbefore set forth the plaintiffs can have no recovery in this action. We do not say they are entirely remediless, but most assuredly their remedy, if it lie at all, is not in a proceeding in equity.

The application for order to show cause is therefore denied. The judgment appealed from is in all things affirmed, with costs.

CHRISTIANSON, J. I concur in the result.

**SCHOOL DISTRICT NO. 109, of Walsh County, North Dakota, v.
PETER HEFTA.**

(160 N. W. 1005.)

**School land — sale of — contract for — purchaser — title — subject to transfer
— by deed — by execution sale — taxation — adverse possession.**

On approval of a contract for the sale of school land, the purchaser obtains a title subject to transfer by deed and by execution sale and subject to taxation and to adverse possession.

Opinion filed January 15, 1917. Petition for rehearing denied January 22, 1917.

Appeal from a judgment of the District Court of Walsh County,
Hon. W. J. Kneeshaw, J.

Affirmed.

Frank B. Feetham, for appellant.

Occupancy for any period confers a title sufficient against all except the state and those who have title by prescription, accession, transfer, will, or succession. Comp. Laws 1913, § 5469.

Occupancy for the statutory time confers a title thereto, known as title by prescription, and is sufficient as against all. Comp. Laws 1913, § 5470.

It has been frequently held by the Federal courts that the statute will not begin to run until the issuance of patent. *Redfield v. Parks*, 132 U. S. 239, 33 L. ed. 327, 10 Sup. Ct. Rep. 83.

It is well settled that adverse possession cannot be urged in favor of anyone so long as the title to the land remains in the government. *Stringfellow v. Tennessee Coal, I. & R. Co.* 117 Ala. 250, 22 So. 997; *Wiggins v. Kirby*, 106 Ala. 262, 17 So. 354; *Wagnon v. Fairbanks*, 105 Ala. 527, 17 So. 20.

The fee of lands held under an imperfect grant (Mexican grant) vests for the first time upon the issuance of the patent, and no length of adverse possession prior thereto will support the Statute of Limitation. *Anzar v. Miller*, 90 Cal. 342, 27 Pac. 299; *Gardiner v. Miller*, 47 Cal. 571; *Manly v. Howlett*, 55 Cal. 94.

In a suit for the recovery of the land commenced after patent issues,

the Statute of Limitations cannot be held to have commenced to run prior to the date of the patent. *Manly v. Howlett*, 55 Cal. 97; *Henshaw v. Bissell*, 18 Wall. 255, 21 L. ed. 835; *Hagar v. Spect*, 48 Cal. 406; *Galino v. Wittenmeyer*, 49 Cal. 12.

Where the legal title remains in the state, under the general principles of the common law there can be no adverse possession of the lands. *Prestwood v. Watson*, 111 Ala. 604, 20 So. 600; *Iverson v. Dubose*, 27 Ala. 418; *Swann v. Lindsey*, 70 Ala. 507; *Nichols v. Council*, 51 Ark. 26, 14 Am. St. Rep. 20, 9 S. W. 305; *Carroll v. Patrick*, 23 Neb. 834, 37 N. W. 671; *Sparks v. Pierce*, 115 U. S. 408, 29 L. ed. 428, 6 Sup. Ct. Rep. 102; *Simmons v. Ogle*, 105 U. S. 271, 66 L. ed. 1087; *Gibson v. Chouteau*, 13 Wall. 92, 20 L. ed. 534; *Taylor v. Combs*, 20 Ky. L. Rep. 1828, 50 S. W. 65; *Lindsay v. Austin*, 139 N. C. 463, 51 S. E. 990; *Hibben v. Malone*, 85 Ark. 584, 109 S. W. 1008.

Everyone is presumed to know the law, and the trustees of the plaintiff are conclusively presumed to have known that the district had no right to occupy the premises, and was a trespasser. *Hawkes v. Deffebach*, 4 Dak. 20, 22 N. W. 480.

In such a case there can be no such thing as good faith. Where the party knows he has no title, and where he is presumed to know he can acquire none by occupancy, he is a wrongdoer. *Deffebach v. Hawke*, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 102.

H. C. De Puy, for respondent.

Title by limitation to school lands can be acquired by limitation or by prescription. *Parker v. Brown*, 80 Tex. 555, 16 S. W. 262; *Dutton v. Thompson*, 85 Tex. 115, 19 S. W. 1026; *Lawless v. Wright*, 39 Tex. Civ. App. 26, 86 S. W. 1039; *Thompson v. Dutton*, 96 Tex. 205, 71 S. W. 544; *Paterson v. Rector*, — Tex. Civ. App. —, 127 S. W. 561.

When the state acquired title it related back to the inception of the title, which commenced with the application to purchase, and the title established at that time was sufficient to sever the land from the mass of the public domain, so that limitations would operate against it. *Thompson v. Dutton*, 96 Tex. 205, 71 S. W. 544, reversing — Tex. Civ. App. —, 69 S. W. 996, affirming — Tex. Civ. App. —, 69 S. W. 641; *Dutton v. Thompson*, 85 Tex. 115, 19 S. W. 1027; *Hibben v. Malone*, 85 Ark. 584, 109 S. W. 1008; *Gonsoulin v. Gulf Co.* 53 C. C.

A. 31, 116 Fed. 251; *Sage v. Rudnick*, 91 Minn. 325, 98 N. W. 89, 100 N. W. 106; *Nicholson v. Congdon*, 95 Minn. 188, 103 N. W. 1034; *Iowa R. Land Co. v. Blumer*, 206 U. S. 482, 51 L. ed. 1148, 27 Sup. Ct. Rep. 769; *Webster v. Pittsburg, C. & T. R. Co.* 78 Ohio St. 87, 15 L.R.A.(N.S.) 1154, 84 N. E. 592; *Walcott Twp. v. Skauge*, 6 N. D. 382, 71 N. W. 544; *Great Northern R. Co. v. Viborg*, 17 S. D. 374, 97 N. W. 6.

Color of title is not necessary to perfect title by adverse possession. 1 Cyc. 1083, 1084, 1101; Rev. Codes 1905, §§ 6777, 6780; Comp. Laws 1913, §§ 7365, 7368; *Pendo v. Beakey*, 15 S. D. 344, 89 N. W. 659.

The right of eminent domain may be exercised in behalf of the following public uses—public buildings and grounds for the use of any school district and any real property belonging to any person may be taken. Rev. Codes 1895, §§ 5956, 5958; Comp. Laws 1913, §§ 7205, 8203; *Carter v. Chattanooga*, — Tenn. —, 48 S. W. 117; Cases cited in 18 Century Dig. cols. 829, 1947.

Defendant here has no right to compensation. The vendee of land is not entitled to claim the payment of damages for lands taken, or for injuries done, before he acquires title. 6 Am. & Eng. Enc. Law, 588, and cases cited; Cases cited in 18 Century Dig. col. 1367.

He is estopped to claim any damages. 13 Cyc. 451 et seq.

He is barred by the Statute of Limitations. Cases cited in 18 Century Dig. cols. 2016, 2025.

An action to quiet title or to determine adverse claims is *lis pendens* as to persons acquiring interests *pendente lite*. Cases in 33 Century Dig. col. 1453; 25 Cyc. 1459.

Where purchaser has actual notice of the pendency of the action, filing notice is not necessary. 25 Cyc. 1452; *Brown v. Cohn*, 95 Wis. 90, 60 Am. St. Rep. 83, 68 N. W. 71; *Bell v. Peterson*, 105 Wis. 607, 81 N. W. 279.

Where a defendant is in default in such an action, he must be adjudged to have no estate or interest in the property. Rev. Codes 1905, § 7528, Comp. Laws 1913, § 8153.

Defendant having purchased after default, and with actual notice of the pendency of the action, he takes the case as he finds it, and is bound by plaintiff's right to have his guarantor, and those claiming under

him, adjudged to have no estate in the property. 25 Cyc. 1450, 1479; *Morris v. Linton*, 74 Neb. 411, 104 N. W. 927.

In such cases, and under such circumstances, no recovery or payment for the use of the land can be had. *Christ v. Johnstone*, 25 N. D. 6, 140 N. W. 680.

ROBINSON, J. The plaintiff school district brings this action to quiet title to 2 acres of land in a corner of the N. E. $\frac{1}{4}$ of section 36, township 156, range 52. The complaint simply avers that the plaintiff owns the 2 acres, and that the defendants claim some title or interest in it adverse to the plaintiff. Such a complaint is a mere challenge to the defendant to make a counter complaint and to set forth his claim or abandon it. The answer of Peter Hefta is dated January 3, 1913, and it is the commencement of an action by Peter Hefta to establish his title to the land in question. By its reply the plaintiff claims title by an adverse possession of twenty years prior to January 3, 1913; and the proof of such adverse possession is conclusive. In 1891 Anton Hefta purchased the land, and the sale to him was duly confirmed by the Board of University and School Lands. From the date of approval the land was subject to taxation; it was subject to transfer by defendant and by execution sale, subject only to the balance, if any, that might be due on the contract. It was for all purposes the land of the purchaser, the same as if he had taken a deed and given back a mortgage for the balance of the purchase price. At the end of twenty years, when payment was made, a patent for the land was duly issued to Anton Hefta, who transferred his title to his son, Peter Hefta. For more than twenty years prior to January 3, 1913, both defendants lived within half a mile of the schoolhouse and on the land in question, and never in any way challenged the adverse possession. The claim of defendant is that the statute giving a title by adverse possession of twenty years does not apply to school land prior to the issuing of a patent for the same. By statute, school lands are sold on these terms: The purchaser pays one fifth of the price in cash at the time of the sale, one fifth in five years, one fifth in ten years, one fifth in fifteen years, and the balance in twenty years, with interest at 6 per cent, payable annually. The purchaser gets immediate possession after the approval of the same by the Board of University and School Lands. When full payment is made the governor issues to the pur-

chaser, his heirs, or assigns, a patent conveying title to the land. The approval of the sale was duly made in 1891, and from that time the land was subject to taxation. It was subject to transfer by deed and by execution sale, subject only to any balance remaining due on the contract. It was, for all purposes, the land of the purchaser the same as if he had taken a deed and given back a mortgage for the purchase price. Hence, the title of the purchaser was subject to the Statute of Limitations and to adverse possession.

We are pleased to note that the school district has kindly offered to pay Peter Hefta \$200 for a title which he has ceased to own; and on the payment into court, for the benefit of Peter Hefta, of any balance of said \$200 which may be due after deducting the costs of the trial court and of the appeal to this court, it is ordered that the judgment of the District Court herein be, and the same is, in all things affirmed.

Dated, January 13, 1917.

On Petition for Rehearing, filed January 22, 1917.

ROBINSON, J. The offer of \$200 by the school district was a gratuity, and the proper application of the same will effectually relieve the defendants from the payment of any cost. There is no occasion for modifying the judgment, and the petition for a rehearing is denied.

ELLIOTT SUPPLY COMPANY, a Corporation, v. E. L. GREEN.

(160 N. W. 1002.)

Answer — defenses — abandonment on trial — court — reading same to jury — instructions — as a whole — error.

1. Where certain defenses are pleaded but are abandoned on the trial, it is bad practice for the court to read the answer to the jury or to refer specifically

NOTE.—On the passing of title to property by delivery thereof to carrier for transportation to consignee or vendee, see note in 22 L.R.A. 415, in which conflicting decisions are collated.

On the right to rely on representations made on sale of goods, see note in 37 L.R.A. 614.

35 N. D.—41.

in his instructions thereto. It is the better practice to merely instruct the jury as to what the sole and only defenses are. Where, however, the instructions, taken as a whole, are such as to make it clear to any reasonably intelligent man that these defenses are not in the case and are not to be considered, prejudicial error will not be presumed.

Contract — divisible — ascertaining its character — instrument itself — from.

2. In determining whether the contract is divisible or indivisible, the intention of the parties should be sought to be ascertained from an examination of the entire instrument.

Contract — entire.

3. Contract examined and held to be entire and indivisible.

Goods sold and delivered — purchase price — action for — entire contract — full performance — plaintiff must show — passing of title — rescission.

4. Before an action for the purchase price can be brought upon an indivisible contract for the sale and delivery of a bill of goods, it is incumbent upon the plaintiff to show a full performance of such contract on his part and the delivery and passing of title of the entire order before a rescission of such order or contract by the purchaser.

Contract — goods sold — as to delivery — silent — common carrier — delivery to — by vendor — in usual course — title — transfer of.

5. Where the contract of purchase is silent to the person or mode by which goods are to be sent, a delivery by the vendor to a common carrier in the usual and ordinary course of business transfers the property to the vendee. Yet in the case of an indivisible contract the whole order must be so delivered.

Contract — voidable — sale of goods — representations — reliance on — false — known to be so.

6. Where the purchaser of silverware was a druggist, and not engaged in the regular business of selling such goods, it was not error to instruct the jury that "if you find from the evidence that the agent of the plaintiff did represent to the defendant that the prices of the goods specified in the order were the usual wholesale prices of such goods; that the defendant relied on that statement and would not have signed the order if said statement had not been made; that such statement was false and known to the plaintiff to be false when it was made, and that the prices of such goods stated in the order were not the usual wholesale prices of such goods, but were excessive and more than the usual wholesale prices, then the written contract would be voidable as to the defendant."

Contract — sale of goods — provision that it contains all agreements — fraud — deceit — defense — terms of contract — such defense does not vary.

7. Even though a contract contains a provision that "this contract contains all the conditions and agreement between the parties, and the purchaser hereby acknowledges a receipt of a duplicate hereof," and the contract as signed con-

tains no reference to the general wholesale price of the articles sold, a defense may yet be interposed in a suit upon the contract based upon fraud and deceit in obtaining the execution of the same by a false representation as to such wholesale price. Such defense does not seek to vary the terms of the contract, but merely to show fraud in its inception.

Opinion filed January 22, 1917.

Action to recover the purchase price of merchandise.

Appeal from the District Court of Richland County, *Frank P. Allen*,

J.

Judgment for defendant. Plaintiff appeals.

Affirmed.

Purcell, Divet, & Perkins, for appellant.

In the trial of a case before a jury, a pleading filed in the case is not affirmative evidence in behalf of the party filing it. It is only evidence which the jury should consider, and it was error for the court to read to the jury those parts of the defenses contained in the answer which had been abandoned by defendant and to which no evidence has been adduced or directed. *Bertelson v. Chicago, M. & St. P. R. Co.* 5 Dak. 313, 40 N. W. 531, 11 Am. Neg. Cas. 269; *Chisholm v. Keyfauber*, 110 Cal. 102, 42 Pac. 424; *Frederick v. Kinzer*, 17 Neb. 366, 22 N. W. 770; *Hickman v. Link*, 116 Mo. 123, 22 S. W. 472; *Boyce v. Aubuchon*, 34 Mo. App. 315; *Marshall v. Heller*, 55 Wis. 392, 13 N. W. 236; *Knudson v. Laurent*, 159 Iowa, 189, 140 N. W. 392; *O'Neil v. Cardina*, 159 Iowa, 78, 44 L.R.A.(N.S.) 1175, 140 N. W. 196; *Larson v. Chicago, M. & St. P. R. Co.* 31 S. D. 512, 141 N. W. 353; *Haight v. Vallet*, 89 Cal. 245, 23 Am. St. Rep. 465, 26 Pac. 897; *Sargent v. Linden Min. Co.* 55 Cal. 204, 3 Mor. Min. Rep. 207; *Baltimore Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. 338; *Waddingham v. Hulett*, 92 Mo. 528, 5 S. W. 27; *Scott v. Clayton*, 54 Wis. 499, 11 N. W. 595; *Abbott*, Civ. Trial Brief, 676, note 1, and cases cited; *Iverson v. Look*, 32 S..D. 321, 143 N. W. 332.

Or where the court submits the case to the jury on two conflicting theories of law. *Peterson v. Conlan*, 18 N. D. 205, 119 N. W. 367; *Jones v. Matthieson*, 2 Dak. 523, 11 N. W. 109; *Blair v. Groton*, 13 S. D. 211, 83 N. W. 48; *Bowen v. Epperson*, 136 Mo. App. 571, 118 S. W. 528.

The giving of a correct instruction will not overcome the giving of an erroneous one. *Rosenbaum Bros. v. Hayes*, 5 N. D. 481, 67 N. W. 951; *Lindblom v. Sonsteli*, 10 N. D. 145, 86 N. W. 357; *Marshall v. Heller*, 55 Wis. 392, 13 N. W. 236.

Where correct and incorrect instructions are given, and which bring before the jury issues and questions not in the case, it is impossible to say that the verdict is based upon issues in the pleadings, or otherwise. *Swanson v. Allen*, 108 Iowa, 419, 79 N. W. 132; *Black v. Miller*, 158 Iowa, 293, 138 N. W. 535; *Stevens v. Maxwell*, 65 Kan. 835, 70 Pac. 873; *Kansas City, Ft. S. & M. R. Co. v. Eagan*, 64 Kan. 421, 67 Pac. 887; *Kansas City, Ft. S. & M. R. Co. v. Dalton*, 66 Kan. 799, 72 Pac. 209; *Baltimore & O. R. Co. v. Lockwood*, 72 Ohio St. 586, 74 N. E. 1071, 18 Am. Neg. Rep. 590; *Murray v. Burd*, 65 Neb. 427, 91 N. W. 278; *Geddes v. Van Rhee*, 126 Minn. 517, 148 N. W. 549; *Lang v. Omaha & C. B. Street R. Co.* 96 Neb. 740, 148 N. W. 964; 11 Enc. Pl. & Pr. 154; 38 Cyc. 1608, and cases cited; *Mt. Terry Min. Co. v. White*, 10 S. D. 620, 74 N. W. 1060.

"If the part to be performed by one party consists of several distinct items, and the price to be paid by the other is proportioned to each item to be performed, or is left to be implied by law, such contract will generally be held to be severable." 2 *Parsons*, Contr. p. 648; *Norris v. Harris*, 15 Cal. 226; *Spear v. Snider*, 29 Minn. 463, 13 N. W. 910; *Miner v. Bradley*, 22 Pick. 457; *Herzog v. Purdy*, 119 Cal. 99, 51 Pac. 27; *Fullmer v. Poust*, 155 Pa. 275, 35 Am. St. Rep. 881, 26 Atl. 543; *Lucesco Oil Co. v. Brewer*, 66 Pa. 351; *Bank of Antigo v. Union Trust Co.* 149 Ill. 343, 23 L.R.A. 611, 36 N. E. 1029; *Quigley v. De Haas*, 82 Pa. 267; *Rugg v. Moore*, 110 Pa. 236, 1 Atl. 320; *Ming v. Corbin*, 142 N. Y. 334, 37 N. E. 105; *Rubin v. Sturtevant*, 26 C. C. A. 259, 51 U. S. App. 286, 80 Fed. 930; *Schiller v. Blyth & F. Co.* 15 Wyo. 304, 8 L.R.A.(N.S.) 1167, 88 Pac. 648; *Field v. Austin*, 131 Cal. 379, 63 Pac. 692.

It is the duty of the trial court, without being requested, to instruct on all material issues and legal propositions involved in the case, and a failure to do so is reversible error. *Comp. Laws* 1913, § 7620; *Moline Plow Co. v. Gilbert*, 3 Dak. 239, 15 N. W. 1; *Putnam v. Prouty*, 24 N. D. 517, 140 N. W. 93; *Capital City Brick & Pipe Co. v. Des Moines*, 136 Iowa, 243, 113 N. W. 839; *Hyde v. Minnesota*, D.

& P. R. Co. 24 S. D. 386, 123 N. W. 849; Owen v. Owen, 22 Iowa, 270; Barton v. Gray, 57 Mich. 622, 24 N. W. 638.

The defendant cannot now say that he relied upon the representations of the plaintiff to his prejudice, as to the prices, etc., when he had it in his power to have easily ascertained the true state of affairs before making the contract, and failed to do so. Burns v. Mahannah, 39 Kan. 87, 17 Pac. 319; Foley v. Cowgill, 5 Blackf. 18, 32 Am. Dec. 49; Uhler v. Semple, 20 N. J. Eq. 288; Mosher v. Post, 89 Wis. 602, 62 N. W. 516; Poland v. Brownell, 131 Mass. 138, 41 Am. Rep. 215.

A catalogue or list or prices of goods made and promulgated is not admissible unless a foundation is laid therefor, showing how and what manner it is prepared, the nature and source of the information contained, and whether the quoted prices were based upon actual sales. Whelan v. Lynch, 60 N. Y. 469, 19 Am. Rep. 202; Wilbur v. Buckingham, 153 Iowa, 194, 132 N. W. 960, Ann. Cas. 1913E, 210.

J. A. Dwyer and Wolfe and Schneller, for respondent.

The contract here was entire and indivisible for the sale and delivery of certain goods—the amount and quantity being specified. The delivery was for a less amount, and defendant refused to take any. There was no delivery of the goods bought. Sunshine Cloak & Suit Co. v. Roquette Bros. 30 N. D. 143, L.R.A.1916E, 932, 152 N. W. 359.

Where parties to a contract do not meet upon an equal footing, by reason of the extensive knowledge of the one, and the lack of knowledge of the other, a confidential relation exists, and the latter has the right to place confidence in and rely on the representations made to him by the other. Liland v. Tweto, 19 N. D. 556, 125 N. W. 1032.

BRUCE, Ch. J. This is an appeal from a verdict and judgment for the plaintiff, and this opinion is written after argument on a petition for a rehearing.

The complaint alleges “that on or about the 24th day of September, 1913, the plaintiff sold and delivered to the defendant, goods, wares, and merchandise (silverware) for which the defendant promised and agreed to pay the sum of \$180, that no part of said sum has been paid.”

The answer contains a general denial, and in addition alleges a rescission of the contract of purchase on the ground of fraudulent rep-

representations which were alleged to have been made in the procuring of the contract, and on the ground that the goods were not as represented and contracted for.

The first point urged by the appellant is that the court erred in charging the jury that:

"There has been some testimony introduced here tending to show misrepresentation as to the wholesale price of these articles by the representative of the plaintiff, and it is also claimed that there was a shortage in the goods. Now, as I remember the testimony on behalf of the defendant in this case, these are the only two points in controversy here, while there are other reasons set up in the answer, these—the only testimony offered was in connection with these two matters."

Counsel for appellant urges that as it was admitted that evidence had only been introduced in support of two of the defenses pleaded in the answer, a reference to the answer generally must only have tended to confuse the jury.

He also and in connection with the same point complains that the trial court in his charge to the jury practically repeated the language of the answer wherein the defendant alleged that "the goods were not according to sample and of no value, a positive damage to a dealer, were not triple plate Rogers make 1847, and that the plaintiff was not the manufacturer of the silverware." He asserts (and truthfully) that none of these defenses were relied upon by the defendant at the trial, nor was any evidence given in their support.

We do not approve of these instructions, nor of what to all intents and purposes was the reading of the answer to the jury, nor do we see any necessity therefor. It would, indeed, have been much preferable and much better practice to have merely stated to the jury that the only issues were whether or not there was a misrepresentation as to the wholesale price of the articles and as to whether or not there was a shortage in the goods. See *Branthover v. Monarch Elevator Co.* 33 N. D. 454, 156 N. W. 927; *Swanson v. Allen*, 108 Iowa, 419, 79 N. W. 133.

We hardly can see, however, how the defendant could have been prejudiced in the matter. We must assume that the jury was composed of reasonably intelligent men, and it is the tendency of most men to discredit rather than to credit a defendant who in his answer pleads many defenses and upon the trial introduces evidence in support of but one

or two of them. So, too, granted that the jury was composed of reasonably intelligent men, the instructions, if taken as a whole, could in no sense have been misleading.

The jury was positively told that it "should look solely to the evidence for the facts, and to the instructions of the court for the law." It was told positively that "there were only two points in controversy in the case, and that these related solely to the alleged misrepresentation as to the wholesale price and to the alleged shortage. It was positively informed that, "while there are other reasons set up in the answer, these—the only testimony offered was in connection with these two matters."

We have carefully examined the decisions cited by counsel for appellant, and, though many of them disapprove of the practice adopted by the trial judge in the case at bar, none of them lead us to believe that the appellate tribunals which handed them down would have ordered a new trial on the record which is before us. In all of them, indeed, the instructions were palpably misleading, and there was a misdirection, and matters were submitted which were not properly before the jury, or the cases were submitted on two inconsistent and conflicting theories of law. Here there was no submission, there was, in fact, a withdrawal. As stated by counsel for respondent, the sum and substance of the charge was simply this: "The defendant claims in his answer, so and so, as it has been read to you, but as to all of these claims but two there is no evidence, so I instruct you that these two are the only two points in controversy here."

Nor do we believe that the jury could have been misled by the subsequent instruction that "any affirmative allegation, not simply denials, but any affirmative allegations in the answer—which is the paper that is brought—put in here by the defendant—must be proved by a preponderance of the evidence," and that "the affirmative of the issues is upon the defendant to establish the matters and things alleged in his affirmative defense."

Counsel for appellant urges that it was for the court to point out which issues were material and which were not. This, however, we believe it had already clearly done. Not only, indeed, had it told the jury that there were only two issues in the case—that of misrepresentation as to wholesale price, and that of shortage—but everywhere throughout its charge it over and over again emphasized these points, and to such

an extent that to our minds no intelligent jury could come to any other conclusion than that they were the sole and only issues.

Nor do we believe that a new trial should be granted on account of the fact that the court charged the jury that the contract was indivisible, and that if they found that any substantial part of the goods was not delivered or offered for delivery before the commencement of the action, then the plaintiff could not recover. The instruction complained of, indeed, was more favorable to the plaintiff than the evidence warranted. The contract sued upon, or which, at any rate, was proved by the plaintiff as the basis of its action, was entire and indivisible. It was on a printed form. After first giving a list of the goods with the prices attached thereto, it read as follows:

This Entire Order is Wm. Rogers Goods.

Warranty: Any article which is not exactly as represented may be returned to us and we will replace it with a new article without charge, regardless of the cost of the article.

Sales Guaranty: We guarantee that the purchaser will sell a quantity of silverware in one year, which at the retail price will equal at least one and one-half times the amount of this order. If sales are less than this amount, we agree to take back at the purchase price the goods remaining on hand, at the expiration of this contract. This guaranty is given on condition that the purchaser will keep the goods displayed for sale in a showcase, and furnish us on the first day of each month an itemized list of all goods on hand. When the purchaser becomes satisfied with the sales he may omit these lists without voiding any part of this contract except this paragraph.

Terms: This order is payable in six equal payments, due in 2..4..6..8..10..and 12..months from date of invoice; provided the purchaser sends us promptly on arrival of goods his six acceptances for the amount and terms of the above payments, or if acceptances are not so sent, terms are cash; 5 per cent discount if paid in full promptly on arrival of the silverware. In consideration of the conditions under which we sell our goods we cannot accept countermands, and the purchaser hereby agrees not to countermand this order. Purchaser pays all transportation charges. All goods shipped at our earliest conven-

ience and can be returned only as herein provided. This contract contains all the conditions and agreements between the parties, and the purchaser hereby acknowledges a receipt of a duplicate hereof.

The reasons given by appellant for contending that this contract is divisible are as follows:

- (1) It contains an itemized list of the articles ordered.
- (2) This list describes each article by name and design, and gives the number, the price per dozen, and the price for the fraction of a dozen so ordered.
- (3) The contract nowhere states the total price of the articles ordered.
- (4) Since each article is itemized, it can be told at a glance what the purchaser is paying for each.
- (5) The warranty in the contract that "any article which is not exactly as represented may be returned to us and we will replace it with a new article without charge, regardless of the cost of the article," presupposes a collection of individual articles, each one separate and distinct from the other, rather than an indivisible mass of goods.
- (6) The articles were purchased for the purpose of selling to the retail trade, and that it is a matter of common knowledge that silverware is more often purchased by the piece than by the entire set.
- (7) That the articles enumerated were of several different and distinct designs, and hence did not constitute one entire set.

All of these facts stated by the appellant may be conceded, however, and yet leave the court still in doubt as to the nature of the contract. 6 R. C. L. 858.

These conditions do not override the clear intention of the parties, if such contention can be gathered from the whole subject-matter of the contract. 6 R. C. L. 859.

And we believe that there is in the contract in question a clear indication of what that intention was, and that it was that the contract should be entire.

An important part of the contract is the so-called sales guaranty. This provides that "we (the seller) guarantee that the purchaser will sell a quantity of silverware in one year, which at the retail price will equal at least one and one-half times the amount of this order. If sales

are less than this amount, we agree to take back at the purchase price the goods remaining on hand, at the expiration of this contract."

It is clear from this that the seller desired a showing in the showcases of the entire order. His guaranty was that the sales in one year would "at the retail price equal at least one and one-half times the *amount of this order.*" It was provided that there should be no countermand "*of this order.*" The order, in short, was treated as an entirety. There was no guaranty of sales if less than the goods contracted for were bought, nor if less than the goods contracted for were exhibited.

Added to this fact is the fact that the plaintiff, Officer Bevin, testified in his deposition that the goods were sold in specified lots.

Added to this is the fact that, when on the trial defendant moved for a directed verdict, the plaintiff objected on the ground that the parol evidence of the shortage varied the written contract.

We have carefully examined the cases cited by the appellant, but in none of them do we find a contract similar to the one at bar, and which itself evidences an intention that the contract shall be entire.

The contract being indivisible, it was necessary for the plaintiff to show a full performance on its part and a passing of the title before the rescission by the defendant or purchaser, and before it could maintain an action for the purchase price. 2 Mechem, Sales, §§ 811, 1139; Norrington v. Wright, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12; Sunshine Cloak & Suit Co. v. Roquette Bros. 30 N. D. 143, L.R.A. 1916E, 932, 152 N. W. 359; Hart-Parr Co. v. Finley, 31 N. D. 130, L.R.A.1915E, 851, 153 N. W. 137.

The defendant testified that when the shipment was received by the vendee there was a shortage of articles to the amount of \$15.72, or one twelfth of the entire contract price, and though there is some testimony that all of the order was shipped, there is no conclusive presumption that this was the fact, and the jury evidently found that it was not. Plaintiff, indeed, himself offered to remit the amount from the purchase price. Though it is undoubtedly the law that where the contract of purchase is silent as to the person or mode by which the goods are to be sent, a delivery by the vendor to a common carrier in the usual and ordinary course of business transfers the property to the vendee. Mechem, Sales, § 736. Yet, in the case of an indivisible contract the whole order must be so delivered, and there was certainly evidence to go to

the jury from which the jury might arrive at the conclusion that this had not been done, and the verdict of the jury can be sustained on this theory and on this theory alone.

We are not here called upon to pass upon the question of whether an action for damages could have been maintained for the breach of the contract on the part of the defendant. It is sufficient to say that the action before us is on the contract and for the contract price, and that there is evidence that that contract had been rescinded.

But was it reversible error for the court to charge the jury that "I instruct you that if you find from the evidence that the agent of the plaintiff did represent to the defendant that the prices of the goods specified in the order exhibit 'B' were the usual wholesale prices of such goods; that Mr. Green relied on that statement and would not have signed the order if such statement had not been made; that such statement was false and known to the plaintiff to be false when it was made, and that the prices of said goods stated in the order were not the usual wholesale prices of such goods, but were excessive and more than the usual wholesale prices of such goods, then, the written order, exhibit 'B,' would be voidable as to the defendant Green, and he would not be bound by it and might lawfully refuse to carry it out.

"And in such case, the plaintiff could not recover in this action, and your verdict should be for the defendant."

We think that the giving of this instruction was not error. It is undoubtedly the general rule that where an article is on the general market and the price of the article is publicly known, one cannot avoid a contract because of a representation to him that the price was less or the same as the market price. This rule is announced in order to avoid perjury and fraud and to lend stability to business transactions. It was never intended, however, to be a cover for fraud. In other words, fraud should always avoid contracts, unless reasons of public policy require the fraud to be tolerated. Here the purchaser was not a jeweler, but a druggist, and the purchase of silverware was not a usual transaction either with him or usual to his business. It is true that he probably had in his store some wholesale price lists, but we probably all have some such lists in our possession. He had the right to assume that the agent of the seller had first knowledge of the facts of which he spoke,

and we believe that he had the right to rely upon the truth of his statement. *Liland v. Tweto*, 19 N. D. 551, 556, 125 N. W. 1032.

But it is claimed that the contract contains the provision that "this contract contains all the conditions and agreement between the parties, and the purchaser hereby acknowledges a receipt of a duplicate hereof," and that this provision prevents the defendant from setting up the defense of fraud. It is claimed, indeed, that no fraud is shown in regard to this particular clause, and that it is not claimed that the defendant signed it unwittingly or without having an opportunity to read it.

This argument would probably be persuasive if it was applied to the warranties and conditions of the contract. We are not, however, dealing with such warranties or conditions here. The defendant is not suing for a breach of warranty. He is simply claiming fraud in the inception of the contract, in other words, that he was induced to execute the contract and to execute it wholly because of the fraud in the statement. We therefore think that the defense is maintainable, and that the instruction was properly given. *State v. Nicola*, 169 Iowa, 171, 151 N. W. 70; *Bishop*, Contr. 2d ed. § 669.

The judgment of the District Court is affirmed.

GRACE, J., being disqualified, did not participate.

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PRESUMPTIONS.

1. An appellate court will indulge all reasonable presumptions in favor of the correctness of the judgment or order from which the appeal is taken. *Skaar v. Eppeland*, 116.

TRIAL DE NOVO.

2. Where, as in the case at bar, a trial *de novo* is asked under the provisions of § 7846, Compiled Laws of 1913, and the record is in such a condition that an intelligent disposition in the supreme court is impossible on account of the vague, indefinite, and uncertain state of the testimony, a new trial will be ordered in the district court. *Williams County State Bank v. Gallagher*, 24.
3. Under § 7846, Compiled Laws (relating to trial *de novo* in the supreme court), a new trial will be ordered when the supreme court deems such course necessary to the accomplishment of justice. *Sutherland v. Noggle*, 538.

DISCRETIONARY MATTERS.

4. The granting or denial of a new trial on the ground that the evidence is insufficient to sustain the verdict, or that excessive damages were awarded, is within the sound judicial discretion of the trial court, and its decision will not be disturbed except where an abuse thereof is clearly shown. *Skaar v. Eppeland*, 116.
5. In an action for malpractice, where there has been a fair trial, an order denying a new trial will not be reversed when it is doubtful on which side the evidence preponderates. *Hager v. Clark*, 591.

QUESTIONS NOT RAISED BELOW.

6. An objection to the introduction of evidence upon one or more specific grounds does not go to other grounds not stated, and is a waiver of all other grounds of objection not stated. *Petrie v. Wyman*, 126.

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REVIEW OF FACTS.

7. A controverted question of fact as to the existence of an escrow agreement and as to its conditions was presented, and the verdict of the jury thereon is conclusive on this review of error. *Northern Trust Co. v. Bruegger*, 150.
8. The finding by the jury that plaintiff was not guilty of contributory negligence is contrary to all the admitted facts and to plaintiff's own proof, and cannot be upheld. A directed verdict of dismissal should have been ordered. *Nordby v. Sorlie*, 395.

WHAT ERRORS WARRANT REVERSAL.

9. No substantial or prejudicial error is shown, and the judgment appealed from is affirmed. *Northern Trust Co. v. Bruegger*, 150.
10. Statements of counsel in argument to the jury do not warrant the granting of a new trial. *Northern Trust Co. v. Bruegger*, 150.
11. Instructions requested and refused, and those given and challenged as error and argued in the brief examined and held to fairly submit the issues of fact and to be nonprejudicial. *Northern Trust Co. v. Bruegger*, 150.
12. Action upon an account stated, with defense a general denial. Instructions examined and held prejudicial, as withdrawing from the jury determination of a controlling issue of fact. *Lemke v. Thompson*, 192.
13. An instruction to the effect that "when witnesses are otherwise equally credible greater weight and credit should be given to those whose means of information are superior and also to those who swear affirmatively to a fact, rather than to those who swear negatively, or to a want of knowledge or want of recollection, is criticized, but held not to constitute reversible error. *McGilvra v. Minneapolis, St. P. & S. Ste. M. R. Co.* 275.
14. Where certain defenses are pleaded but are abandoned on the trial, it is bad practice for the court to read the answer to the jury or to refer specifically in his instructions thereto. It is the better practice to merely instruct the jury as to what the sole and only defenses are. Where, however, the instructions, taken as a whole, are such as to make it clear to any reasonably intelligent man that these defenses are not in the case and are not to be considered, prejudicial error will not be presumed. *Elliott Supply Co. v. Green*, 641.
15. The court at the close of the testimony denied a motion to direct judgment against the *News Printing Company*, codefendant, but instead, in its instructions, required the jury to find in any event for the plaintiff and against the *News Printing Company* for the amount claimed. This action

APPEAL AND ERROR—continued.

did not prejudice defendant's rights, and is the equivalent of the granting of a motion for a directed verdict. *Northern Trust Co. v. Bruegger*, 150.

JUDGMENT.

16. This is an action or motion concerning the custody of a minor child of the plaintiff and the defendant. There was no good reason for commencing the action, and the judgment has been given for a large sum of costs and attorneys' fees, without any findings of fact or conclusions of law; and hence the judgment is reversed and the action dismissed without costs. *Styles v. Styles*, 599.
17. When the supreme court has entered a final order in a cause brought there on appeal, and the remittitur has been transmitted to, and judgment entered thereon in, the court below, the supreme court loses jurisdiction to recall the remittitur and reinstate the cause, unless the order directing the issuance of the remittitur was based on fraud or mistake of fact. *Youmans v. Hanna*, 479.

ASSESSMENTS.

Right of city to recover from county amount retained by county treasurer as fee for collecting city assessments, see *Counties*.

ASSIGNMENT.

Of note, see *Bills and Notes*.

Parol evidence to show invalidity of assignment of sheriff's certificate, see *Evidence*, 8.

Of insurance policy, see *Insurance*, 4, 5.

ASSOCIATIONS.

Exemption of, from taxation, see *Taxes*.

ASSUMPSIT.

Against county, see *Counties*.

ATTACHMENT.

As to garnishment, see *Garnishment*.

ATTORNEY GENERAL.

Refusal to bring proceedings to secure issuance of prerogative writ,
see Courts, 8-10, 12.

ATTORNEYS.

Argument of counsel, see Appeal and Error, 10.

Stipulation by, see Stipulation.

RIGHT TO PRACTICE.

1. Nonresident counsel are not permitted to practice in the courts of North Dakota as a matter of right, but as a matter of permission and privilege merely. *Youmans v. Hanna*, 479.

DISBARMENT.

2. Dismissal of a civil action against attorney for moneys unlawfully detained by him has no bearing upon disbarment proceeding. *Re Maloney*, 1.
3. Abandonment of client's interest and retention of the fees paid for services, which are not rendered, constitute a wilful violation of the duties of an attorney and counselor sufficient to warrant disbarment. *Re Maloney*, 1.

AUTOMOBILES.

1. Plaintiff, riding a motor cycle, met defendant driving an automobile, and collided with the rear wheel of the auto just as it was turning out of plaintiff's half of the roadway. Plaintiff recovered a verdict of \$2,500 for alleged negligence of defendant, who appeals. *Held*, there is no proof that defendant was negligent. *Nordby v. Sorlie*, 395.
2. Conceding that defendant was negligent, it is conclusively established by plaintiff's own testimony and by uncontroverted evidence that plaintiff was guilty of contributory negligence barring his recovery. *Nordby v. Sorlie*, 395.

BAILMENT.

As to warehousemen, see Warehousemen.

BANKRUPTCY.

- A transaction in which the owner of a mercantile business gives to a creditor an assignment of an insurance policy, in order that such creditor may collect the amount thereof and apply the same to the payment of a prior
- 35 N. D.—42.

BANKRUPTCY—continued.

loan, and which is given in furtherance of a prior agreement by which the insurance policy was pledged to the said creditor as security for money loaned and for future advances, and under the understanding that in case of fire such authority to collect or assignment should be given, is not an unlawful preference under the Federal Bankruptcy Act, even though made within four months of the act of bankruptcy, the money being loaned, and the policy having been pledged, prior to that time. *Hecker v. Commercial State Bank*, 12.

BANKS.

Sufficiency of evidence to sustain verdict in action by bank against former officer for wrongful release of securities held by bank, see Evidence, 17.

1. It is the duty of a state banking board to require a bank to remove objectionable securities where, in its opinion, the safety of the depositors requires it. *Youmans v. Hanna*, 479.
2. Where such board takes such an action and is justified by the facts in doing so, the motives of its members are immaterial, since no liability can be based upon the performance of a clear and positive public and official duty. *Youmans v. Hanna*, 479.
3. If a banker feels aggrieved at the action of the state banking board in requiring him to remove objectionable securities, he should apply to the courts to have such order set aside under the provisions of ¶ 3, § 5146, Comp. Laws, 1913. Unless this is done such order will remain in force and be effective. *Youmans v. Hanna*, 479.
4. An order of the state banking board requiring the Savings Deposit Bank, of Minot, to remove objectionable securities, and closing the bank on account of the failure so to do, *held* to have been lawful and valid. *Youmans v. Hanna*, 479.
5. The purchase of the controlling stock in the said bank by certain of the defendants after it had been closed *held* to have been a valid and legal transaction. *Youmans v. Hanna*, 479.

BID.

For public contract, see Contracts, 5, 6.

BILLS AND NOTES.

Delivery in escrow, see Escrow.

Presumptions in action on, see Evidence, 2, 3.

BILLS AND NOTES—continued.

Parol evidence as to, see Evidence, 7.

Sufficiency of evidence to sustain findings in action on, see Evidence, 18, 19.

Defendant's pleading in action on, see Pleading, 7, 8.

Set-off in action on, see Set-off and Counterclaim, 2, 3.

1. Under the Code of North Dakota and the Negotiable Instrument Act as adopted by the National Commission on uniform state laws, a note which is payable to order, and which has not been indorsed, and has come into the hands of a third person by assignment merely, is subject to any defenses which could have been interposed against the original payee. *Emerson-Brantingham Co. v. Brennan*, 94.
2. Absence or failure of consideration for a note is a matter of defense as against any person not a holder in due course, and a partial failure of consideration is a defense *pro tanto* whether the failure is an ascertained and liquidated amount or otherwise. *Emerson-Brantingham Co. v. Brennan*, 94.

BOARDS.

State banking board, see Banks, 1-4.

Action of board of county commissioners as to establishment of highway, see Highways.

BONDS.

Redelivery bond, see Evidence, 12; Judgment, 4.

Of warehouseman, see Evidence, 6a; Warehousemen, 1.

Of municipality, see Municipal Corporations, 3.

BROKERS.

Instructions in action for commissions, see Trial, 8.

Question for jury in action for commissions, see Trial, 4.

1. If a landowner sends to an agent various lists of land at a certain net price, and the agent interests a prospective purchaser, and such purchaser refuses to pay the list price and wants more land than that offered, and is referred by the agent to the principal to see if he can make a deal with him, and the principal keeps on dealing with the prospective purchaser both by himself and through the agent, and urges the agent to continue using his influence with the purchaser, and afterwards the principal meets with the

BROKERS—continued.

- purchaser alone and effects a sale for less than the list price and for more land than actually listed, but yet contemplated in the transactions between the purchaser and the agent, such agent can recover from such principal and on the *quantum meruit* a commission on such sale for his services performed. *Farmer v. Holmes*, 344.
2. Where a real estate agent furnishes a buyer upon terms which, even though not originally contemplated, are satisfactory to his clients, and a sale is made on such terms, such agent will be entitled to recover the reasonable value of his services rendered. *Farmer v. Holmes*, 344.
 3. Where a real estate agent is employed to furnish a buyer upon terms acceptable to his principal, and such principal is himself to consummate the agreement or sale, it is immaterial whether such agent acts by himself or through a third party, and whether there is one or two joint vendees, provided the vendee or vendees are acceptable to the principal, and which fact will be presumed from the mere closing of the deal. *Farmer v. Holmes*, 344.

BUILDINGS.

Lien on, see *Mechanics' Liens*.

BURDEN OF PROOF.

In general, see *Evidence*, 2-6.

CAPITAL.

Amendment of Constitution as to seat of state government, see *Courts*, 2.

CARRIERS.

- Conclusiveness of decision as to confiscatory character of rates, see *Judgment*, 3.
- Action to recover sum exacted in excess of legal rates, see *Judgment*, 3.
- Delivery to carrier of goods sold, see *Sale*, 2.

CERTIORARI.

1. Under § 8445, Compiled Laws 1913, a writ of certiorari will not be granted in any case unless the inferior court, officer, board, or tribunal has exceeded its jurisdiction and there is no appeal, nor, in the judgment of the court,

CERTIORARI—continued.

any other plain, speedy, and adequate remedy. *State ex rel. Brunette v. Pollock*, 430.

2. Certiorari is not the proper remedy to review the correctness of a final order or judgment in a mandamus proceeding, inasmuch as the ordinary remedy by appeal is available. *State ex rel. Brunette v. Pollock*, 430.

CHARITIES.

Exemption of, from taxation, see *Taxes*.

CHATTEL MORTGAGE.

Estoppel to assert lien of, see *Estoppel*.

Necessity of filing mortgage, see *Garnishment*, 5.

CHILDREN. See *Infants*.**CLAIM AND DELIVERY.** See *Replevin*.**COLLATERAL ATTACK.**

On lease, see *Evidence*, 5.

On proceedings of board of county commissioners as to establishment of highway, see *Highways*, 2.

COMMISSIONS.

Of broker, see *Brokers*.

COMMON CARRIERS. See *Carriers*.**COMPENSATION.**

Of broker, see *Brokers*.

Of officer, see *Officers*, 2.

COMPLAINT.

Of plaintiff, see *Pleading*, 2-5.

COMPROMISE AND SETTLEMENT.

Of insurance loss, see *Insurance*, 1, 6-10.

CONDITIONS.

Of escrow agreement, see Escrow.

Parol evidence of, see Evidence, 7.

CONSIDERATION.

Absence or failure of, as defense to note, see Bills and Notes, 2.

CONSPIRACY.

1. The gist of the action of conspiracy is damage, and where no damage is proved the action cannot be maintained. *Youmans v. Hanna*, 479.
2. Except where the members engaged make what would otherwise be a lawful and innocent act a nuisance and harmful, what one may do singly a number may do together. The mere fact that a number of persons join together in making a purchase of banking stock upon terms and conditions which would have been perfectly lawful for one to do by himself does not render such transaction unlawful. *Youmans v. Hanna*, 479.

CONSTITUTIONAL LAW.

Constitutionality of Mothers' Pensions Law, see Mothers' Pensions.

AMENDMENTS.

Power of court to review legislative action as to, see Courts, 2-4.

Injunction against submission of question of amendment, see Injunction.

1. The proposal of constitutional amendments, whether by resolution of the senate and house of representatives or by initiative petition, is not legislation, and involves no legislative act or province, or power of state sovereignty; but is merely a duty ministerial in character, fixed by, and to be exercised only under and by compliance with, the terms of the Constitution. *State ex rel. Linde v. Hall*, 34.
2. As there is no law authorizing any amendment of our state Constitution by initiative proceedings, the petition is void upon which the respondent threatens to submit this question to vote. *State ex rel. Linde v. Hall*, 34.

CONSTRUCTION; SELF-EXECUTING PROVISIONS.

3. Certain well-known canons of interpretation and construction of the Constitution announced and followed. *State ex rel. Linde v. Robinson*, 417.

CONSTITUTIONAL LAW—continued.

4. The construction of the Constitution as here declared, while never announced in a contested case, has for twenty-four years been followed by the judges of the supreme court in entering upon the discharge of the duties of their respective offices. This uniform rule of action, acquiesced in without a single exception for so long a period, constitutes a practical construction of the Constitution, which cannot now be avoided. *State ex rel. Linde v. Robinson*, 417.
5. Subdivision 2 of § 202 of the state Constitution is not, and was not intended to be, self-executing; but is only a mandate to succeeding legislatures to provide laws whereunder the Constitution may be amended by initiative petition. This is the very apparent intention because:
 - (a) Subdivision 2 contemplates that the publication of notice of submission of such amendments shall be regulated and prescribed by future legislation.
 - (b) Subdivision 2 contemplates that legislation shall be enacted declaring the percentage of signers actually necessary to propose constitutional amendments, as the words of said subdiv. 2 "of at least 25 per cent" were intended to be but a limitation upon the legislature that at least 25 per cent should be required, but not to declare the percentage necessary, leaving that to future legislative action to determine the proper and necessary minimum percentage to be required, whether that percentage be 25 per cent, or more than 25 per cent.
 - (c) It is strongly indicative of necessity for future legislation that no definite rule for computation of any requisite percentage of signers is declared under subdiv. 2, while under the constitutional provision as to initiative of legislation the basis is there prescribed as "the whole number of votes cast for secretary of state at the regular election last preceding the filing" of the petition.
 - (d) The failure to mention or prescribe the substance or form of an enacting clause to constitutional amendments proposed by initiative petition, while the provision for initiative of legislation does prescribe the form of the enacting clause to be used, is strong evidence that future legislation would supplement said subdiv. 2 by defining the form of any enacting clause to be used thereunder.
 - (e) The history of its enactment, taken in the light of contemporaneous legislative action upon these and other concurrent resolutions introduced in or passing at the legislative sessions of 1911 and 1913, negatives an intent that subdiv. 2 should be self-executing.
 - (f) Our constitutional provisions were taken from the Oregon Constitution. The omission of the words found in the Oregon Constitution that would have made this provision self-executing, and then so interpreted there by court decision thereon, must be presumed to have been deliberate and in-

CONSTITUTIONAL LAW—continued.

tentional and for the purpose of preventing subdiv. 2 from being construed as self-executing. *State ex rel. Linde v. Hall*, 34.

6. That portion of § 176 of the state Constitution which provides that "the legislative assembly shall by a general law exempt from taxation property used exclusively for school, religious, cemetery, or charitable purposes," was addressed to the legislature, and not to the courts. Its terms looked forward to, and required, "ulterior action upon the part of the lawmaking branch of the government." (*Engstad v. Grand Forks County*, 10 N. D. 54.) *State ex rel. Linde v. Packard*, 298.

CONSTRUCTION.

Of constitution, see Constitutional Law, 3, 6.

Of contract, see Contracts, 2, 3.

CONTRACTS.

Construction of crop-payment contract, see Crops.

Parol evidence as to written contracts, see Evidence, 7-9.

Of infant, see Infants.

As to sale, see Sale.

Land contracts, see Vendor and Purchaser.

1. A contract, not in writing, to pay interest in excess of the legal rate may be enforced for such legal rate only. *First Nat. Bank v. Mesaner*, 76.

ENTIRETY.

2. In determining whether the contract is divisible or indivisible, the intention of the parties should be sought to be ascertained from an examination of the entire instrument. *Elliott Supply Co. v. Green*, 641.
3. Contract examined and held to be entire and indivisible. *Elliott Supply Co. v. Green*, 641.

PERFORMANCE.

4. Where one makes a contract with another to perform certain work at a stated contract price, and fails to perform or carry out his part of the contract and perform precedent conditions incumbent on him to perform, no recovery can be had on such contract for the contract price by reason of such non-performance. *Kupfer v. McConville*, 622.

CONTRACTS—continued.

PUBLIC CONTRACTS.

Municipal contracts generally, see Municipal Corporations.

5. Section 3705 of the Compiled Laws of 1913, which provides, among other things, that in advertising for bids the city council shall call for bids upon a basis of cash payment, and that "the city council may also require bidders to state the rate of interest the warrant shall bear," is mandatory in its nature, and a pleading does not show a compliance with the statute which admits that the advertisement "did not call for bids upon a cash basis or require the bidders to state the rate of interest the warrant should bear," and merely alleges "that part of the proposals for bids which the city commission acted upon and considered at the time of the awarding of the contract was in fact upon a cash basis, and the rate of interest was in fact stated in the said proposals for bids." *McKenzie v. Mandan*, 107.
6. A defect in an advertisement for bids under the provisions of § 3705, Compiled Laws of 1913, is not cured, even though all the bidders bid upon a cash basis and state the rate of interest, if any others are precluded from bidding on account of a belief that because of a defect in the advertisement any contract that would be entered into would be illegal. *McKenzie v. Mandan*, 107.

CONTRIBUTORY NEGLIGENCE.

In general, see Negligence.

CONVERSION. See Trover and Conversion.

COOK.

Right to farm laborer's lien, see Liens, 1.

CORPORATIONS.

As to banks, see Banks.

1. A forfeiture of corporate stock must, in the absence of a by-law to the contrary or a special provision in the charter, be declared by duly elected directors and by the number required to conduct corporate business, and such directors cannot delegate their powers and duties in the premises. *Jensen v. Northwestern Underwriters Asso.* 223.
2. The power to declare the forfeiture of corporate stock for nonpayment of the

CORPORATIONS—continued.

amount due thereon must be exercised in strict compliance with the charter or statutory requirements. *Jensen v. Northwestern Underwriters Asso.* 223.

COSTS AND FEES.

1. A trial court has authority to award to the prevailing party (who has in no way been in fault and is entitled to a new trial as a matter of right), upon a motion for a new trial, the costs and disbursements incident to such motion, whether such party ultimately becomes the prevailing or losing party in the final judgment which may be obtained in the action. *Swallow v. First State Bank*, 323.
2. The fact that, in such case, the order granting a new trial is silent as to costs, is not equivalent to an adjudication that costs and disbursements be not allowed to the prevailing party. *Swallow v. First State Bank*, 323.
3. In such case fees paid the court stenographer for a transcript upon which the motion for a new trial is found are properly taxed as a necessary disbursement in favor of the prevailing party. *Swallow v. First State Bank*, 323.
4. In an action brought in McHenry county, venue was changed upon stipulation to Pierce county, where a jury trial was had. A certified bill of disbursements for jurors, bailiffs, and other expenses was presented to McHenry county to reimburse Pierce county. Payment was refused. McHenry county contends that as all parties litigant in said action were nonresidents of McHenry county and as the change of venue was ordered upon a stipulation, it is not liable under § 7810, Comp. Laws 1913. *Held*, That this recovery is one within the terms of and authorized by the statute, and that McHenry county must reimburse Pierce county for such disbursements. *Pierce County v. McHenry County*, 239.

COUNSEL.

Argument of, see Appeal and Error, 10.

In general, see Attorneys.

COUNTERCLAIM. See Set-Off and Counterclaim.

COUNTIES.

Compensation of county treasurer, see Officers, 2.

1. Various county treasurers from 1901 until 1910 retained for themselves 1 per cent of all Fargo city special assessments as a fee for collection. This action is to recover of the county this 1 per cent, amounting to \$3,847.

COUNTIES—continued.

The county never received this money, as it was never placed in any fund of the county treasurer. But the city claims that the county treasurer collected as the agent of the county, and which in turn was the collecting agent for the city under the law whereunder the county treasurer collected city special assessments and turned the same over to the city.

There is no statute expressly making the county liable to the city for misapplication of such funds by the county treasurer.

Held: The county treasurer, in making such collections, acted under the law designating him as the official to collect, and no liability of the county to the city arises unless the county actually receives the money of the city; and until the county treasurer turns money so collected over to the county and credits a county fund therewith, the county has not had and received city money. *Fargo v. Cass County*, 372.

2. That any liability of the county in such a case must arise from receiving city funds with no doctrine of agency involved, as the county is not an agent of the city in making such a collection; nor does its treasurer in collecting for the city, act as an agent of the county or city, but instead acts only as a person designated by law to collect for the city and for whose shortages or defalcations the county is not responsible to the city unless it has received funds so misappropriated. *Fargo v. Cass County*, 372.
3. No liability on the part of the county can be inferred because by statute the bonds of the county treasurer are subject to the approval and action of the administration board of the county, leaving the treasurer without control or supervision by the city. The county officials involved are merely the official machinery designated by law for use in the raising and accounting for revenue for state, county, city, and other purposes. *Fargo v. Cass County*, 372.

COUNTY COMMISSIONERS.

Determination of, as to establishment of highway, see *Highways*.

COUNTY TREASURER.

Liability of county for retention by county treasurer of fee for collection of special city assessments, see *Counties*.

Compensation of, see *Officers*, 2.

COURTS.

As to judges, see *Judges*.

COURTS—continued.

RELATION TO OTHER DEPARTMENTS OF GOVERNMENT.

1. The courts will not assume a greater control of or supervision over purely political matters than can clearly be deemed to have been conceded to them by the express provisions of the statutes and of the Constitution. *State ex rel. McArthur v. McLean*, 203.
2. Original writ of injunction to prevent submission upon ballot at the coming general election of an amendment to § 215 of the state Constitution, to remove the seat of state government from Bismarck to New Rockford. A petition for such a constitutional amendment was filed with respondent, who, unless restrained, will submit said question to ballot. Relators assert that the petition filed is void, claiming that subdiv. 2 of § 202, state Constitution, is not self-executing; and hence that until legislation is passed to make it possible to operate under subdiv. 2, the Constitution cannot be amended by initiative petition. *Held*: The legal sufficiency of the petition filed is a judicial, and not a legislative, question. *State ex rel. Linde v. Hall*, 34.
3. In filing such a petition for, and in submitting to a vote, a proposition to amend the Constitution by initiative petition the secretary of state is not a legislative agent, and performs only ministerial duties reviewable in judicial proceedings. *State ex rel. Linde v. Hall*, 34.
4. Whether proceedings to amend a Constitution are valid as performed within such constitutional limitations is a proper judicial inquiry, and its determination by court decision is not an invasion by the judiciary of the constitutional functions, province, and legislative duties of the legislative department of the government. *State ex rel. Linde v. Hall*, 34.

ORIGINAL JURISDICTION; PREROGATIVE WRITS.

See also *supra*, 2.

5. The prerogative jurisdiction of the supreme court will be exercised only in cases wherein the questions involved are *publici juris* and the sovereignty of the state or its franchises or prerogatives or the liberties of its people are affected. *State ex rel. Linde v. Robinson*, 410.
6. A controversy between a majority of the present members of the supreme court and certain successful candidates at the last general election who claim the right to occupy such offices and exercise the duties thereof, presented to this court by the petition of the attorney general, is a matter of such public interest and involves the sovereign rights of the state and its people in a degree sufficient to require the exercise of such original jurisdiction. *State ex rel. Linde v. Robinson*, 410.

COURTS—continued.

7. The majority of the members of a political state central committee has the inherent power to depose or elect a chairman at any time, and the supreme court will not issue its high prerogative writs in order to bring about that which voluntary political action can perform. *State ex rel. McArthur v. McLean*, 203.
8. Where the issuance of an original and prerogative writ is asked of the supreme court on the ground that the matter is of public concern, and the attorney general refuses to bring the proceedings, but expresses a willingness that they shall be brought, the case will be considered in the same light as if there had been merely a refusal on the part of the attorney general. *State ex rel. McArthur v. McLean*, 203.
9. The supreme court will not refuse to issue its original writs where matters of public importance are concerned, merely because the attorney general refuses to himself bring or sanction the action. *State ex rel. McArthur v. McLean*, 203.
10. The test of the jurisdiction of the supreme court where the issuance of an original writ is prayed for but the attorney general refuses to bring the proceedings is whether the individual relator is in fact a necessary party or a mere incident, and whether after all it is a public injury which is sought to be remedied or prevented, and involves the franchises and prerogatives of the state. *State ex rel. McArthur v. McLean*, 203.
11. The right to the untrammelled exercise according to law of the elective franchise, even though it is, strictly speaking, a right or franchise of the individual citizen rather than of the collective and sovereign state, and even though, in a limited area, is a matter not only *publici juris*, but one which ultimately affects the self-governing franchises and prerogatives of the sovereign state itself, and can in the discretion of the supreme court, and in exceptional cases, be safeguarded by the issuance of its prerogative writs. *State ex rel. McArthur v. McLean*, 203.
12. The writ of injunction contemplated by § 87 of the Constitution of North Dakota is correlative with the writ of mandamus, the former issuing to restrain and the latter to compel action, and is not limited to cases involving civil or property rights, but may be resorted to in all cases affecting the sovereignty of the state, its franchises, or prerogatives, or the liberties of the people. It includes within its scope and protection political as well as civil or property rights, and may be issued under a proper showing and in the discretion of the court even at the suit of a private individual and against the opposition of the attorney general himself. *State ex rel. McArthur v. McLean*, 203.

JURISDICTION OF PROBATE COURT.

13. Section 111 of the Constitution of the state of North Dakota, so far as

COURTS—continued.

it is germane to the issues in this case is as follows: to wit: "The county court shall have exclusive jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators, and guardians, the sale of land by executors, administrators, and guardians, and such other probate jurisdiction as may be conferred by law." *Cass County v. Nixon*, 601.

14. The county court of Cass county, sitting as a probate court, had jurisdiction of the subject-matter of the petition. *Cass County v. Nixon*, 601.

RULES OF DECISION.

15. A decision promulgated by district judges, so called, to sit in place of justices of the supreme court is the decision of the supreme court of North Dakota, and entitled to the same consideration as though it had been promulgated by a like number of regularly elected justices of the supreme court. *Youmans v. Hanna*, 479.

CREDIBILITY.

Of witness, see Witnesses.

CRIMINAL LAW.

As to conspiracy, see Conspiracy.

CROPS.

Damages for destruction of, see Damages, 1.

Right of lessee to recover damages for destruction of, see Evidence, 5.

Opinion evidence as to value of, see Evidence, 10.

Farm laborer's lien for labor performed in threshing, see Liens.

Conversion of, see Trover and Conversion.

Contract construed and held to entitle the vendee in a crop-payment contract to the proceeds of the crop grown in a certain year. *Regent State Bank v. Grimm*, 290.

CUSTODY.

Of child, see Infants.

DAMAGES.

Excessive damages as ground for new trial, see Appeal and Error, 4.

Pleading as to, see Pleading, 5.

1. Where hay is destroyed by a prairie fire the owner is entitled to recover its reasonable value at the place where and at the time when destroyed, and for the uses and purposes to which it could be reasonably applied. Where there is a fixed local market value, that value usually prevails. Where, however, there is no local market, the value at the nearest market usually prevails, but to this must be added the cost of transportation if the hay is kept for use merely, and from this the cost of transportation will be deducted if it is kept for sale. Where no market price prevails, or the market price is clearly inadequate, a liberal rule of proof obtains, and evidence may be introduced of the prices paid at occasional sales and of the uses for which the hay was kept and adapted as well as of the cost of production. *McGilvra v. Minneapolis St. P. & S. Ste. M. R. Co.* 275.
2. In order that an article may be said to have a market price, it must be shown that other property of the same kind was the subject of purchase or sale in so many instances that the value became in a measure fixed by a consensus of buyers and sellers in the ordinary course of trade. *McGilvra v. Minneapolis, St. P. & S. Ste. M. R. Co.* 275.

DEBTOR AND CREDITOR.

Conveyances fraudulent as to creditors, see Fraudulent Conveyances.

DECLARATIONS.

In pleading, see Pleading, 2-5.

DEEDS.

Sufficiency of proof of, see Evidence, 20.

DE FACTO OFFICERS.

See Judges, 4; Officers, 3.

DEFENSES.

Error in instructions as to, see Appeal and Error, 14.

To note, see Bills and Notes.

DEFENSES—continued.

Election as to, see Election.

Parol evidence of defense based on fraud, see Evidence, 9.

DEFINITIONS.

Public office, see Elections, 2.

DELIVERY.

In escrow, see Escrow.

Of goods sold, see Sale.

DEMAND.

Necessity of proof of, in action for conversion, see Trover and Conversion.

DEMURRER. See Pleading, 5, 7.

DENIALS.

In pleading, see Pleading, 6.

DE NOVO.

Trial *de novo* on appeal, see Appeal and Error, 2, 3.

DIRECTION OF VERDICT. See Trial, 5.

DISAFFIRMANCE.

Of contract of infant, see Infants.

DISBARMENT.

Of attorney, see Attorneys, 2, 3.

DISCHARGE.

Of mortgage, see Mortgage.

DISCRETION.

Review of, on appeal, see Appeal and Error, 4, 5.

ELECTION.

No question of rescission of a contract was involved, and the motion to require defendant to elect as to defenses was properly denied. *Northern Trust Co. v. Bruegger*, 150.

ELECTIONS.

Issuance of prerogative writ to safeguard right to untrammelled exercise of elective franchise, *see* Courts, 11.

POLITICAL COMMITTEES.

Prerogative writ to depose chairman of state central committee, *see* Courts, 7.

1. Section 890 of the Compiled Laws of 1913 examined and *held* not to make membership in the state central committee prerequisite to its chairmanship. *State ex rel. McArthur v. McLean*, 203.
2. A public office is a public position to which a portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public. The chairman of a state central committee possesses no such authority, and is therefore not a public officer. *State ex rel. McArthur v. McLean*, 203.

ELEVATOR COMPANY.

Conversion of grain by, *see* Trover and Conversion, 1.

ENTIRETY.

Of contract, *see* Contracts, 2, 3.

EQUITY.

As to injunction, *see* Injunction.

ESCROW.

Review of findings as to, on appeal, *see* Appeal and Error, 7.

1. A delivery of a note deposited in escrow without compliance with the terms of the escrow agreement constitutes in law no delivery of the instrument. *Northern Trust Co. v. Bruegger*, 150.
2. Under such findings the instrument never was delivered and has been void *ab initio*, and the evidence offered by defendant to establish the escrow agreement was admissible. *Northern Trust Co. v. Bruegger*, 150.
35 N. D.—43.

ESCROW—continued.

3. Bruegger has not waived the conditions of the escrow agreement, nor estopped himself from asserting it as a defense. *Northern Trust Co. v. Bruegger*, 150.

ESTOPPEL.

To assert breach of conditions of escrow agreement, see *Escrow*, 3.
Of insurer, see *Insurance*, 6–9.

As to effect and conclusiveness of judgment, see *Judgment*, 3, 4.

Where the holder of a chattel mortgage is requested by an elevator agent to induce the mortgagor to deliver grain covered by such mortgage to the elevator operated by such agent, and subsequently stands by and sees the grain sold and delivered to such agent, and permits payment therefor to be made to the mortgagor without informing the purchaser of the mortgage lien, and makes no demand for either the grain or the proceeds thereof until more than two years after the grain has been sold and delivered, he is estopped from asserting any lien under such mortgage against the elevator company. *Mohall State Bank v. Duluth Elevator Co.* 619.

EVIDENCE.

Waiver of objections to, see *Appeal and Error*, 6.
New trial for newly discovered evidence, see *New Trial*, 2.
Reception of, on trial, see *Trial*, 1.

JUDICIAL NOTICE.

1. The court takes judicial notice of the fact that Judges elect Robinson, Grace, and Birdzell were elected and will be entitled to take their seats on the first Monday in January, 1917. The fact whether or not a certificate of election has been issued to them is therefore immaterial. However, if issued, no administrative officer has power, by giving a certificate to that effect, to cause a term of office to begin prior to the time when so provided by the Constitution. *State ex rel. Linde v. Robinson*, 417.

PRESUMPTION AND BURDEN OF PROOF.

On appeal, see *Appeal and Error*, 1.

2. No presumption of law applies that, from plaintiff's production of the note in complete form, with her signature underneath it, that it was complete,

EVIDENCE—continued.

- and such when delivered as against inferences under the proof. *Behles v. Duffy*, 181.
3. There is no presumption of law that she delivered the note in complete form or at all under the proof. *Behles v. Duffy*, 181.
 4. Proof that a witness knows the signature of the alleged maker of a lease, and knows that it is his signature that is on the instrument, constitutes prima facie proof of the execution of such instrument, and will entitle it to be introduced in evidence. *McGilvra v. Minneapolis St. P. & S. Ste. M. R. Co.* 275.
 5. Where the record title to land is in "B, trustee," one who holds possession of such land under a lease from such trustee is prima facie entitled to recover damages for the negligent burning of the hay thereon, and as against a collateral attack on such lease, even though there is no proof of the authority of such trustee to execute the same. *McGilvra v. Minneapolis, St. P. & S. Ste. M. R. Co.* 275.
 6. In actions to recover the price or value of goods sold the burden is on plaintiff to prove the existence and validity of the contract of sale, and the terms thereof, the price or value, the delivery and acceptance, of the goods, and the amount thereof, and his compliance with the contract, or a waiver of its provision by the buyer, and he has also the burden of proving that goods delivered or tendered complied with the contract. *Skogness v. Seger*, 366.

DOCUMENTARY EVIDENCE.

- 6a. Upon default and proof made by plaintiffs there was received in evidence without objection the warehouseman's bond, certified by the secretary of the board of railroad commissioners as "a true copy of the bond now on file in the office of" said board. Appellants now claim the same to have been inadmissible and insufficient as proof of the cause of action. *Held*: (a) As no objection was made to the reception of this evidence, all objections thereto are waived. (b) In any event, the statute governing the admission of certified copies of such official bonds was sufficiently complied with. And the copy constituted sufficient proof of the contents of the original bond. *State ex rel. Ertelt v. Daniels*, 5.

PAROL EVIDENCE.

7. The correspondence soliciting the note and transmitting it to the holder in escrow discloses that it is but part of and supplementary to the conditions under which the note was executed and was to be delivered. The correspondence can therefore be explained and supplemented in such particulars by oral testimony. *Northern Trust Co. v. Bruegger*, 150.

EVIDENCE—continued.

8. Where no fraud or deception has been practised by the purchaser, a person will not be allowed to question by parol evidence the validity of an assignment of a sheriff's certificate, and to contend that he executed the same intending it to be a certificate of redemption. *Reitsch v. McCarty*, 555.
9. Even though a contract contains a provision that "this contract contains all the conditions and agreement between the parties, and the purchaser hereby acknowledges a receipt of a duplicate hereof," and the contract as signed contains no reference to the general wholesale price of the articles sold, a defense may yet be interposed in a suit upon the contract based upon fraud and deceit in obtaining the execution of the same by a false representation as to such wholesale price. Such defense does not seek to vary the terms of the contract, but merely to show fraud in its inception. *Elliott Supply Co. v. Green*, 641.

OPINION EVIDENCE.

10. A farmer is competent to testify as to the value of hay which is grown upon his own land, and this even in the absence of proof of a market for the same. *McGilvra v. Minneapolis, St. P. & S. Ste. M. R. Co.* 275.

RELEVANCY AND MATERIALITY.

11. For the reasons stated in the opinion, certain rulings on the admission of evidence are sustained, and certain instructions are held proper or nonprejudicial. *Shellberg v. Kuhn*, 448.
12. In an action to recover damages for an alleged breach of a redelivery undertaking executed by defendants as sureties in a claim and delivery action, certain rulings in defendants' favor rejecting offered testimony, examined and held proper. *Clark v. Ellingson*, 546.
13. Where certain land is injured by a prairie fire and the nature and extent of the scorching or burning of the soil is capable of direct proof, evidence is not admissible as to the injuries which have been occasioned by other fires to other lands at other times, the test being the injury to and the effect on the particular land in question. *McGilvra v. Minneapolis, St. P. & S. Ste. M. R. Co.* 275.

ADMISSIBILITY UNDER PLEADINGS.

14. Evidence received as to the financial condition of the newspaper plant involved and the worthlessness of the stock of the holding company owning and operating it was admissible under the issues tendered by the pleadings. *Northern Trust Co. v. Bruegger*, 150.

EVIDENCE—continued.**SUFFICIENCY.**

Insufficiency of evidence as ground for new trial, see Appeal and Error, 4.

Sufficiency of, to go to jury, see Trial, 2.

15. Proof of fraud must be clear and convincing, and be evidenced by facts which are inconsistent with an honest purpose. *Reitsch v. McCarty*, 555.
16. Evidence examined and *held*, not to justify the contention that the assignments of certain sheriff's certificates were either intended to be certificates of redemption, or were made to the purchaser not for himself, but as a trustee. *Reitsch v. McCarty*, 555.
17. In an action by a bank to recover damages against its former vice president for the alleged wrongful release of certain securities claimed to be held by such bank, without first collecting interest due it, the answer denies that any such securities were held by the bank, and also denies that he wrongfully released any such alleged securities. The jury found both issues in plaintiff's favor. The sufficiency of the evidence to sustain these findings was challenged in the trial court, and is now challenged on this appeal. *Held*, for reasons stated in the opinion, that the evidence is insufficient to sustain the latter finding, and that a verdict for appellant should have been directed. *First Nat. Bank v. Messner*, 78.
18. Action on a promissory note for \$5,000 by Bruegger as maker to the News Printing Company, payee, dated in May, 1910, and indorsed to plaintiff. *Held*: Evidence is sufficient to sustain the findings of the jury that the note was delivered to one Hollister, managing officer of both the payee and plaintiff corporations, and under an escrow agreement, and that the delivery to the payee by the holder in escrow was made in disregard of and contrary to and without compliance with the terms of the escrow agreement. *Northern Trust Co. v. Bruegger*, 150.
19. Action to recover on an alleged promissory note for \$2,500 of Mary Duffy, which defendant claims she never executed, and to be a forgery. *Held*: The evidence is sufficient to sustain the finding of the trial court that the instrument is not the note of Mary Duffy, but was written in over her signature. *Behles v. Duffy*, 181.
20. Sections 5569, 5571, and 5572 of the Compiled Laws of 1913, were merely intended to be applicable to proof before the registers of deeds, where unacknowledged instruments are sought to be recorded, and in other instances, and, when deeds and leases are sought to be proved, the general rules of evidence apply. *McGilvra v. Minneapolis, St. P. & S. Ste. M. R. Co.* 275.

EXCESSIVE DAMAGES.

As ground for new trial, see Appeal and Error, 4.

EXECUTION.

Levy on, see Levy and Seizure.

EXECUTORY LAND CONTRACT.

Levy on, see Levy and Seizure.

EXEMPTION.

From taxation, see Taxes.

FACTS.

Review of, on appeal, see Appeal and Error, 7, 8.

FAILURE OF CONSIDERATION.

As defense to note, see Bills and Notes, 2.

FARM LABORERS' LIEN. See Liens.**FIRE INSURANCE. See Insurance.****FIRES.**

Measure of damages for injury by, see Damages.

Evidence in action for injury by, see Evidence, 13.

Set by railway engine, see Railroads.

FORFEITURE.

Of corporate stock, see Corporations, 1, 2.

FRAUD.

Parol evidence as to, see Evidence, 9.

Sufficiency of proof of, see Evidence, 15.

As to fraudulent conveyances, see Fraudulent Conveyances.

Instructions as to, see Trial, 9.

FRAUDULENT CONVEYANCES.

1. Where a creditor receives a conveyance of only so much property as is sufficient to satisfy a pre-existing indebtedness, and receives it in good faith for that purpose, the fact that he may know that his grantor is actuated by a desire to defraud his other creditors will not invalidate the transfer. *Sutherland v. Noggle*, 538.
2. Under the provisions of the statute (Comp. Laws 1913, § 7221) the retention of possession of goods or chattels by a vendor renders the transfer presumptively fraudulent; but where there is any substantial evidence tending to show an actual and continued change of possession, it becomes a question of fact for the jury to determine whether there has been such change of possession. *Petrie v. Wyman*, 126.
3. Evidence examined, and held that it fails to establish plaintiff's contention that defendant exercised control over and sold part of the personal property covered by the trust agreement subsequent to the execution and delivery of such agreement. *Petrie v. Wyman*, 126.
4. A reservation (in a trust agreement) to the grantor or his family, of an advantage inconsistent with the avowed purpose of the conveyance, is ordinarily deemed to be evidence of fraud, rendering the transfer voidable at the instance of nonassenting creditors; but where such reservation is consistent with, or results from, the nature and character of the transfer, it will not, as a general rule, be deemed the reservation of a benefit rendering the transfer fraudulent. *Petrie v. Wyman*, 126.

FREE MASONS.

Exemption of, from taxation, see Taxes, 2.

GARNISHMENT.

Of deed due to continuing partnership to pay individual debt of member of firm, see Partnership.

1. Plaintiff's right to recover against the garnishee is predicated entirely upon defendant's right to recover in his own name and for his own use against the garnishee. *Scott Co. v. Scheidt*, 433.
2. The right of garnishment is merely a statutory right, and one who seeks to avail himself of it must conform to the provisions of the statute. *Hodge v. Anderson*, 20.
3. Under the provisions of § 7568 of the Compiled Laws of 1913, an issuance of the execution is necessary to jurisdiction over a garnishee defendant when the garnishment is in aid of such execution, and it is not sufficient to merely deliver it to the plaintiff's attorney, and there is no such issuance where the execution has merely been delivered to the plaintiff's attorney, and has not

GARNISHMENT—continued.

- in turn been delivered by him to the sheriff or constable for execution. *Hodge v. Anderson*, 20.
4. A garnishee's liability is measured by his responsibility and relation to the defendant; and a plaintiff cannot, by garnishment, place himself in a superior position as regards a recovery than is occupied by the defendant. *Petrie v. Wyman*, 126.
 5. Where a creditor garnishes personal property covered by an unrecorded trust agreement executed and delivered prior to the service of the garnishment process, he does not by such garnishment acquire a lien or interest superior to that of the trustee and beneficiary in the trust agreement, under the statute (Comp. Laws 1913, § 6758) declaring a mortgage of personal property to be void as to creditors unless filed for record in the office of the register of deeds of the county where the property mortgaged or any part thereof is situated, where the debt for which the garnishment action is maintained existed before the execution and delivery of the trust agreement, and the creditor has not altered his position to his detriment since the trust agreement was executed. *Petrie v. Wyman*, 126.

GRAIN.

Storage of, see Warehousemen.

GUARDIAN AND WARD.

Whenever any matters concerning the persons or estates of minors become the subject of legislation or judicial investigation and determination, or when such matters are considered or acted upon by other than a legislative or judicial body, they are each nevertheless dealing with matters of guardianship. *Cass County v. Nixon*, 601.

HARMLESS ERROR.

See Appeal and Error, 9-15.

HAY.

Measure of damages for destruction of, see Damages, 1.

Right of lessee to recover damages for destruction of, see Evidence, 5.

Opinion evidence as to value of, see Evidence, 10.

HIGHWAYS.

Use of automobile on, see Automobiles.

HIGHWAYS—continued.

1. The words "any action" which occur in § 1924, Compiled Laws of 1913, refer to the action of the county commissioners in passing upon and determining the questions presented by a petition for the establishment of a highway, and, if the petition is posted twenty days before such action is taken by the board, the proceedings will not be nullified merely because such petition was not posted more than twenty days before the notices for the meeting were served and posted by the board. *Semerad v. Dunn County*, 437.
2. An appeal lies in North Dakota from the determination of a board of commissioners both as to the route to be taken and the damages to be awarded in the case of the laying out of a highway under the provisions of §§ 1928 to 1930 of the Compiled Laws of 1913. And if in such a case the land of the objector is sufficiently described and the order of the commissioners covers the land of the objector and the survey is in conformity with the order, and the objector has been properly served, such objector cannot afterwards collaterally attack the regularity of the proceedings or the final determination of the board. *Semerad v. Dunn County*, 437.
3. Where the county commissioners seek to establish a highway and enter an order specifying the route, a survey which is subsequently made cannot vary or alter that route, and the order, and not the survey, must govern. *Semerad v. Dunn County*, 437.
4. Where the county commissioners seek to establish a highway, the route of such highway must be described in terms which are intelligible to a reasonably intelligent man, and where an order fails in this particular, it will be void and of no effect. *Semerad v. Dunn County*, 437.

INFANTS.

Dismissal of action as to custody of, see Appeal and Error, 16.

Guardianship of, see Guardian and Ward.

As to mothers' pensions, see Mothers' Pensions.

1. Under the statutes of this state, the contract of a minor over eighteen years of age is not void, but merely voidable; and such contract is enforceable unless disaffirmed in the manner and within the time provided by law. *Casement v. Callaghan*, 27.
2. An infant desiring to avoid a contract must signify his desire and intent to do so, not only by refraining from any act of affirmance, but by performing some positive act of disaffirmance which is of such character as to clearly show his intention not to be bound by his act. *Casement v. Callaghan*, 27.

INITIATIVE, REFERENDUM, AND RECALL.

Amendment of Constitution by initiative proceedings, see Constitutional Law, 1, 2; Courts, 2-4.

Self-executing provisions as to, in Constitution, see Constitutional Law, 5.

INJUNCTION.

To prevent submission of question of amendment of State Constitution, see Courts, 2.

Original jurisdiction of appellate court, see Courts, 2, 12. .

A court should enjoin submission of the question of amending the state Constitution where there is no law under which it could be legally submitted to a vote. *State ex rel. Linde v. Hall*, 34.

INSOLVENCY.

As to bankruptcy, see Bankruptcy.

INSTRUCTIONS.

Prejudicial error in, see Appeal and Error, 11-15.

In general, see Trial, 7-9.

INSURABLE INTEREST. See Insurance, 5.

INSURANCE.

OFFICERS AND AGENTS.

1. A general agent who has been given a draft with which to pay for the amount determined upon in a settlement and adjustment which has been made by him under the authority of an insurance company has implied authority to deliver the same, and his principal will be bound by a delivery, even though, prior to the same, the agent was instructed to hold up the draft, but such secret instructions were not known to the payee. *Michigan Idaho Lumber Co. v. Northern F. & M. Ins. Co.* 244.
2. Instructions to or limitations on the powers of a general agent which are not disclosed cannot be permitted to affect apparent powers, and although the agent violates his instructions or exceeds the limits stated to his authority, he will yet bind his principal to a third person if his acts are within the scope of authority which the principal has caused or permitted him to

INSURANCE—continued.

- appear to possess. A general agent of an insurance company has the implied authority to write temporary policies, and where he agrees that a loss will be covered pending negotiations for a larger policy, his principal will be bound thereby. *Michigan Idaho Lumber Co. v. Northern F. & M. Ins. Co.* 244.
3. Where a general agent of an insurance company states that he will hold a risk "covered," he will be presumed to mean that the insured is at the present time protected against loss, and not merely that he will make a notation and at some future date issue a policy. *Michigan Idaho Lumber Co. v. Northern F. & M. Ins. Co.* 244.

ASSIGNMENT OF POLICY.

Assignment of policy as illegal preference under Bankruptcy Act, see Bankruptcy.

4. A policy of fire insurance may be pledged or assigned orally, as well as by means of a written instrument. *Hecker v. Commercial State Bank*, 12.
5. A creditor who loans to a business concern money, and takes as collateral security to such loan an assignment or pledge of a fire insurance policy on the goods used by the borrower in the business for which the loan is made, has an insurable interest in said goods under the provisions of § 6466, Compiled Laws of 1913, which provides that "every interest in the property, or any relation thereto, or liability in respect thereof of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest." *Hecker v. Commercial State Bank*, 12.

WAIVER; ESTOPPEL.

6. A settlement and contract to pay a specified sum on account of a loss operates as a waiver of any warranty in an insurance policy, unless such settlement was procured by fraud or was the result of a mistake of fact or of a mutual mistake as to the law. *Michigan Idaho Lumber Co. v. Northern F. & M. Ins. Co.* 244.
7. When a claim is made against an insurance company for a loss, the company is required to ascertain the facts as to any breach of warranty, and if it sees fit to pay the claim or to compromise it without examination, it must be deemed to have waived it, and in the absence of fraud it cannot afterwards avail itself of the breach, and it cannot urge payment or settlement by mistake on account of want of knowledge of such breach. *Michigan Idaho Lumber Co. v. Northern F. & M. Ins. Co.* 244.
8. Facts which were known to the general agent of an insurance company and

INSURANCE—continued.

- to its adjuster at the time of adjusting a loss will be deemed to have been known to the insurance company. *Michigan Idaho Lumber Co. v. Northern F. & M. Ins. Co.* 244.
9. Evidence examined, and the defendant company held to have actually known of defects complained of before settlement made. *Michigan Idaho Lumber Co. v. Northern F. & M. Ins. Co.* 244.

ACTIONS.

Construction of complaint in action on policy, see Pleading, 3.

10. Where a loss has been adjusted between an insurance company and a policy holder, such adjustment is a new and independent agreement; and the action for the recovery of the adjusted loss is a suit, not upon the policy, but upon the new promise or contract. *Michigan Idaho Lumber Co. v. Northern F. & M. Ins. Co.* 244.

INTEREST.

Necessity that contract to pay interest in excess of legal rate be in writing, see Contracts, 1.

Interest is calculated on the balance of two cross claims from the date when both become due. *Jensen v. Northwestern Underwriters Asso.* 223.

JUDGES.

Original jurisdiction of appellate court of controversy as to right to judicial office, see Courts, 6.

Judicial notice as to election of, see Evidence, 1.

1. District judges, when called by members of the supreme court, upon reporting for duty, are clothed by the Constitution with all the powers of justices of the supreme court, to the same extent as though they had been regularly elected and qualified to fill such positions. *State ex rel. Linde v. Robinson*, 417.
2. A judge of the district court who is called in to sit in the place of a judge of the supreme court becomes a justice of the supreme court for all purposes in the case in which he is so called, and is invested with the same power and authority conferred upon a justice of the supreme court. *State ex rel. Linde v. Robinson*, 410.
3. A judge of the district court who is called to sit in the place of a justice of the supreme court becomes, when he reports for duty and enters upon the

JUDGES—continued.

discharge of his duties pursuant to such call, for all purposes in the case in which he is so called, a justice of the supreme court, and is vested with the same power and authority as though he had been regularly elected and qualified to fill the office of justice of the supreme court. *Youmans v. Hanna*, 479.

4. For the reasons stated in the opinion, it is *held*, that Justices Fisk, Burke, and Goss were unquestionably *de facto* justices of the supreme court of North Dakota during the month of December, 1916, and consequently their official acts during that time were valid. *Youmans v. Hanna*, 479.

TERM OF OFFICE.

5. The reference in § 92 of the Constitution to the tenure of office of the judges of the supreme court and their holding such offices from the first Monday in December, 1889, had reference wholly to the three judges first elected. *State ex rel. Linde v. Robinson*, 417.
6. Judges of the supreme court are state officers, and all the members thereof, save the first three, begin their terms of office on the first Monday in January, following their election under § 678, Compiled Laws, 1913. *State ex rel. Linde v. Robinson*, 417.

JUDGMENT.

On appeal, see Appeal and Error, 16, 17.

Presumption on appeal as to correctness of, see Appeal and Error, 1.

Certiorari to review, see Certiorari.

JUDGMENT NON OBSTANTE VEREDICTO.

1. From a judgment *non obstante veredicto* defendant appeals. Said judgment was based upon the assumed premise that uncontradicted expert testimony as to the value of services rendered by an attorney established their value as a fact so as to override the verdict of a jury finding them to have been of less value. *Held*, though plaintiff's experts all agree upon the value of said services to be the amount for which judgment was subsequently ordered *non obstante veredicto*, nevertheless the question remained one of fact for the jury to determine as such. *Shuman v. Ruud*, 384.
2. The verdict was conclusive on the value of such services, and it was error to order judgment *non obstante veredicto* for the greater amount. *Shuman v. Ruud*, 384.

JUDGMENT—continued.

RES JUDICATA.

3. Action to recover from a common carrier a sum alleged to have been unlawfully exacted by it from plaintiff in excess of the legal rate for transporting lignite coal between July 1, 1907, and March 5, 1910. The rate exacted was concededly in excess of the rate prescribed by chap. 51, Laws 1907, but defendant and respondent railway company seek to justify the retention of such excess charge because of the decision of the Federal supreme court in Northern P. R. Co. v. North Dakota, 236 U. S. 585, 59 L. ed. 735, L.R.A.—, —, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1, wherein it was adjudged that such statutory rates were confiscatory and void as applied to the facts there considered. But when that case was before this court it upheld such rate statute (see 19 N. D. 45, 25 L.R.A.(N.S.) 1001, 120 N. W. 869), and its decision was affirmed on writ of error (see 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423), with the proviso, however, that it should be "without prejudice to the right of the railway company to reopen the case by appropriate proceedings, if, after adequate trial it thinks it can prove more clearly than at present the confiscatory character of the rates for coal." Held, that such prior decisions are as to defendant railway company *res judicata* upon the issue there determined as to the confiscatory or nonconfiscatory character of the rates as applied to the facts there considered, and such decisions are in no way affected by the later decision of the Supreme Court of the United States above cited, which involves only issues arising out of new facts subsequently occurring. (See 236 U. S. 585, 59 L. ed. 735, L.R.A.—, —, P.U.R. 1915C, 277, 35 Sup. Ct. Rep. 429). It is accordingly held that the rates exacted by defendant were in excess of the legal rates in force during the period in controversy, and plaintiff is entitled to recover such excess with interest. Merrick Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 331.
4. The general rule that sureties in a redelivery undertaking given in a claim and delivery action are, in the absence of fraud or collusion, concluded by the judgment against their principal in the claim and delivery action, has well-recognized exemptions. They are not thus concluded as to matters not within the issues, and therefore not adjudicated in such action. Not being parties to such prior action, the judgment rendered therein is *res judicata* as to such sureties only as to such issues as were therein properly raised, tried, and determined. Clark v. Ellingson, 546.

JUDICIAL NOTICE. See Evidence, 1.

JUDICIAL SALE.

Parol evidence as to sheriff's certificate, see Evidence, 8.

JURISDICTION.

On appeal, generally, see Appeal and Error.

Loss of jurisdiction on appeal, see Appeal and Error, 17.

In general, see Courts.

JURY.

Questions for, see Trial, 2-4.

LABORERS.

Farm laborer's lien, see Liens.

Mechanics' liens, see Mechanics' Liens.

LAND CONTRACT.

Levy on executory land contract, see Levy and Seizure.

In general, see Vendor and Purchaser.

LANDLORD AND TENANT.

Prima facie proof of execution of lease, see Evidence, 4.

Right of lessee to recover damages for destruction of crops, see Evidence, 5.

Sufficiency of proof of lease, see Evidence, 20.

LEASE.

Prima facie proof of execution of, see Evidence, 4.

Sufficiency of proof of, see Evidence, 20.

LEVY AND SEIZURE.

An executory land contract for the purchase of school lands from the state of North Dakota, although technically speaking not real property, must, under the provisions of §§ 300 to 335, Compiled Laws 1913, be levied upon and sold by a creditor of the vendee as such. *Sox v. Miracle*, 458.

LIENS.

Lien of chattel mortgage, *see* Chattel Mortgage.

As to mechanics' liens, *see* Mechanics' Liens.

1. Plaintiff seeks to foreclose her farm laborer's lien for labor performed by her in cooking in a cook-car for a threshing crew while threshing Magill's grain in September and October, 1915. Defendant claims a sale of the threshing rig to another, who hired plaintiff and the threshing crew, and denies responsibility. He also asserts that a farm laborer's lien cannot be claimed for work of the kind performed. From a judgment of dismissal plaintiff appeals, demanding trial *de novo*. *Held*: Under the facts title to the threshing machine is not shown to have passed to the third party, who is held to be either an agent or partner of defendant and engaged with him in a joint venture of threshing defendant's grain. That defendant should be held liable for payment of defendant's wages. *Stevenson v. Magill*, 576.
2. Plaintiff is entitled to a farm laborer's lien, her work contributing directly to threshing of the crop. The case is not governed by *Lowe v. Abrahamson*, 18 N. D. 182. *Stevenson v. Magill*, 576.

LOCAL IMPROVEMENTS. *See* Public Improvements.

LODGES.

Exemption of, from taxation, *see* Taxes.

MALPRACTICE. *See* Appeal and Error, 5.

MANDAMUS.

Certiorari to review judgment, *see* Certiorari, 2.

MARKET VALUE.

As measure of damages, *see* Damages.

MASONS.

Exemption of, from taxation, *see* Taxes, 2.

MASTER AND SERVANT.

As to farm laborer's liens, *see* Liens.

MECHANICS' LIENS.

Where a mechanic's lien is claimed by reason of the alleged performance of a certain contract, and it is found there was no performance of such contract, such mechanic's lien never attached or became a lien, and therefore there is no lien upon which foreclosure can be had. *Kupfer v. McConville*, 622.

MINORS. See Infants.**MONEY.**

Retention of, by attorney as ground for disbarment, see Attorneys, 2, 3.


MORTGAGE.

On chattels, see Chattel Mortgage.

By entryman on government lands, see Public Lands, 1.

The tender and deposit in a bank in the manner provided by the law, of the full amount due upon the notes secured by a mortgage, extinguishes the obligation, and entitles the mortgagor to a certificate of discharge of the mortgage, and renders the mortgagee liable for the penalty prescribed by § 6749, Compiled Laws, for refusing to execute such certificate of discharge. *Swallow v. First State Bank*, 608.

MOTHERS' PENSIONS.

1. Chapter 185 of the Session Laws of 1915, commonly called Mother's Pension Act, is not in conflict with § 111 of the Constitution. The persons to be protected and benefited by chapter 185 are minors of tender years, whose natural guardians are unable to furnish such minors the absolute necessities of life; such minors and their estates are proper subjects of guardianship. *Cass County v. Nixon*, 601.
 2. Chapter 185 of the Laws of 1915 is not in contravention of § 172 of the Constitution of the state of North Dakota, and therefore is not unconstitutional. *Cass County v. Nixon*, 601.
 3. The state, by chapter 185, recognized the pure and valuable influence of maternal parental protection in the proper development of such minors, and therefore provides where such indigent mother is a fit and proper person for leaving her indigent minors in her possession and control, she being by the very laws of nature closely attached to them, rather than take such indigent minors and place them under the guardianship of strangers. *Cass County v. Nixon*, 601.
- 35 N. D.—44. 

MOTIVE.

Of state banking board in requiring bank to remove objectionable securities, see Banks, 2.

MUNICIPAL CORPORATIONS.

Advertising for bids for contract, see Contracts, 5, 6.

Right of city to recover from county amount retained by county treasurer as fee for collecting city assessments, see Counties.

1. In the absence of statutory requirements covering the formalities necessary to bind a municipality to a contractual liability, a municipality is bound by the acts of its officers in accepting a proposal. *Nott Co. v. Sawyer*, 587.
2. Where a board of village trustees allows a bill and directs issuance of warrants in payment for property which it is authorized to buy and which is offered for sale under the terms of a definite proposal, the proposal is accepted, and the village is liable upon the warrants so issued. *Nott Co. v. Sawyer*, 587.
3. Where a legal petition is filed by citizen property owners requesting a board of village trustees to incur a debt or liability, or to issue bonds for a given purpose, the petition is in the alternative only as to the form of the liability, and the submission to vote of the question of issuing bonds does not exhaust the authority of village trustees to incur liability for the purpose stated. *Nott Co. v. Sawyer*, 587.

NEGLIGENCE.

In running automobile, see Automobiles, 1.

Review of finding by jury as to contributory negligence, see Appeal and Error, 8.

Contributory negligence of person injured by automobile, see Automobiles, 2.

NEGOTIABLE INSTRUMENTS. See Bills and Notes.**NEWLY DISCOVERED EVIDENCE.**

New trial for, see New Trial, 2.

NEW TRIAL.

On appeal, see Appeal and Error, 2, 3.

Review of discretion as to, see Appeal and Error, 4, 5.

Allowance of costs, see Costs and Fees, 1-3.

NEW TRIAL—continued.

1. Where a motion for a new trial is duly noticed to be heard at a date prior to the expiration of time for appeal from the judgment, but continued by consent of the parties, and finally submitted and determined after the time for appeal from the judgment has expired, the final character of the judgment is suspended by the pending proceedings, and the court has jurisdiction to determine the motion for a new trial even though the time for appeal from the judgment has expired. *Skaar v. Eppeland*, 116.
2. The showing for a new trial on affidavits, on the grounds of surprise and newly discovered evidence, was insufficient, and denial of the motion was proper. *Northern Trust Co. v. Bruegger*, 150.

NON OBSTANTE VEREDICTO. See Judgment, 1, 2.

NONRESIDENTS.

Right of nonresident counsel to practise in courts of state, see Attorneys, 1.

NOTES. See Bills and Notes.

NOTICE.

Imputing agent's knowledge to insurance company, see Insurance, 8.

OFFICERS.

Liability of county for acts of county officers, see Counties.

Definition of public office, see Elections, 2.

Chairman of state central committee as public officer, see Elections, 2.

As to judges, see Judges.

Binding effect of acts of municipal officers, see Municipal Corporations, 1-3.

TERM OF OFFICE.

Term of office of judge, see Judges, 5, 6.

1. Territorial enactments were by the Constitution carried forward and became the law of the state of North Dakota. The Constitution was adopted in

OFFICERS—continued.

view of a general statute of the territory, § 10, chapter 9, of the Code of 1877, which, by its terms, fixed the date of the commencement of the terms of all state officers upon the first Monday in January, succeeding their election. *State ex rel. Linde v. Robinson*, 417.

COMPENSATION.

2. The county treasurer is not entitled to withhold 1 per cent of city special assessments; and it is immaterial that the official services of that official rendered to the city in collecting city assessments were of a reasonable value of 1 per cent thereof. There is no necessary relation in law between the salary allowed and the work required in office, and there can be no implied authorization to retain a fee on such grounds, where the statute does not grant one. *Fargo v. Cass County*, 372.

OFFICERS DE FACTO.

De facto judges, see Judges, 4.

3. So far as the public and third persons are concerned, the acts of officers *de facto*, performed by them within the scope of their assumed official authority, are generally as valid and binding as if they were the acts of officers *de jure*. And this rule applies with full force to judicial officers. *Youmans v. Hanna*, 479.

OPINION EVIDENCE. See Evidence, 10.

ORDER.

Presumption on appeal as to correctness of, see Appeal and Error, 1.

ORIGINAL JURISDICTION.

Of appellate court, see Courts, 5-12.

PARENT AND CHILD.

As to mothers' pensions, see Mothers' Pensions.

PAROL EVIDENCE. See Evidence, 7-9.

PARTIES.

Petitioners have a sufficient interest to maintain this action. *State ex rel. Linde v. Hall*, 34.

PARTNERSHIP.

A debt due to a continuing partnership cannot be taken by garnishment to pay the individual debt of a member of the firm. *Scott Co. v. Scheidt*, 433.

PAYMENT.

Construction of crop-payment contract, *see Crops*.

PENALTY.

For refusing to execute certificate of discharge of mortgage, *see Mortgage*.

PENSIONS.

Mothers' pensions, *see Mothers' Pensions*.

PERFORMANCE.

Of contract, *see Contracts*, 4.

PERSONAL PROPERTY.

Mortgage on, *see Chattel Mortgage*.

PETITION.

Of plaintiff, *see Pleading*, 2-5.

PHYSICIANS AND SURGEONS.

New trial in action for malpractice, *see Appeal and Error*, 5.

PLEADING.

Admissibility of evidence under, *see Evidence*, 14.

AMENDMENTS.

1. Following the decision in *Satterlund v. Beal*, 12 N. D. 122, *held*, that the mere granting of leave to amend a pleading does not amend it. Such permission must be acted upon and the pleading redrawn, covering the

PLEADING—continued.

desired amendment, and if this is not done, the amendment is deemed abandoned. *Clark v. Ellingson*, 546.

DECLARATION OR COMPLAINT.

See also Warehousemen, 1.

2. Complaint examined, and *held* to state a cause of action on a contract of the defendant to purchase land, and not of the plaintiff to purchase corporate stock. *Jensen v. Northwestern Underwriters Asso.* 223.
3. Complaint examined, and *held* to state a cause of action upon a settlement and adjustment of a fire insurance claim rather than upon the fire insurance policy itself. *Michigan Idaho Lumber Co. v. Northern F. & M. Ins. Co.* 244.
4. Complaint examined, and *held* to state an action on the *quantum meruit*. *Farmer v. Holmes*, 344.
5. A complaint or counterclaim which asks to recover damages for the failure to convey land is sufficient as against a demurrer if it merely alleges a promise to convey, and that the plaintiff was damaged by the breach thereof in an amount stated. Such damages are general, and need not be specially pleaded. *Emerson-Brantingham Co. v. Brennan*, 94.

DEFENDANT'S PLEADINGS.

6. When all items of an account are admitted to be correct except one left for future adjustment, the account becomes stated as to those items agreed to be correct; but the debtor on such partial stated account may offset against it items not included in the stated account, but left for future adjustment. This defense can be maintained under a general denial. *Lemke v. Thompson*, 192.
7. Where a person sued on a promissory note seeks to prove that part of the consideration thereof was that the payee should purchase and obtain the transfer to him of a certain piece of land, and alleges these facts in a special plea, and the added fact that by reason of the payee's failure to perform his part of the agreement the consideration of the note has failed to the amount of \$1,000, such plea will sustain proof of such contract and loss and is not vulnerable to a demurrer on the ground that the terms on which the payee was to purchase the property, or the value of the property, or its value at the time of its sale, or the compensation to be paid to the payee, if any, are not stated. *Emerson-Brantingham Co. v. Brennan*, 94.
8. A plea which alleges that the consideration of a note has failed to a certain

PLEADING—continued.

amount by reason of the breach of one of the terms of its delivery by the payee, but which does not ask for affirmative relief, must be looked upon as a defense or plea of recoupment, and not as a set-off. *Emerson-Brantingham Co. v. Brennan*, 94.

PLEDGE AND COLLATERAL SECURITY.

Assignment of fire insurance policy as collateral security, see Insurance, 5.

POLITICAL COMMITTEES. See Courts, 7; Elections.

POLITICAL QUESTIONS.

Power of court to review, see Courts, 1.

POOR AND POOR LAWS.

As to mothers' pensions, see Mothers' Pensions.

POSSESSION.

Retention of, by seller as proof of fraud, see Fraudulent Conveyances, 2.

PRAIRIE FIRE.

Measure of damages for injury by, see Damages.
Evidence in action for injury by, see Evidence, 13.
Set by railway engine, see Railroads.

PREFERENCE.

By bankrupt, see Bankruptcy.

PREJUDICIAL ERROR. See Appeal and Error, 9-15.

PREROGATIVE WRITS. See Courts, 5-12.

PRESUMPTIONS.

On appeal, see Appeal and Error, 1.
In general, see Evidence, 2-6.

PRINCIPAL AND AGENT.

As to brokers, see *Brokers*.

Insurance agent, see *Insurance*, 1-3.

Imputing agent's knowledge to insurance company, see *Insurance*, 8.

PRINCIPAL AND SURETY.

Conclusiveness against surety of judgment against principal, see *Judgment*, 4.

PROBATE COURTS.

Jurisdiction of, see *Courts*, 13, 14.

PUBLIC CONTRACTS. See *Contracts*, 5, 6.**PUBLIC IMPROVEMENTS.**

Where a local improvement is completed, but the commissioners failed to advertise for bids as required by § 3705, Compiled Laws 1913, and an action is brought to set aside the assessment, the court should himself make a reassessment under the provisions of § 3715, Compiled Laws 1913, in so far as the objector is concerned, and should ascertain "the true and just amount which the property attempted to be so assessed by said special assessment should pay." In determining the amount that should be paid, however, the total cost of the improvement should not be arbitrarily fixed at the amount paid for the work or at the amount of the bid which was accepted, but at the reasonable cost of such improvement, but not exceeding the amount of the contract. *McKenzie v. Mandan*, 107.

PUBLIC LANDS.

Levy on executory land contract for purchase, see *Levy and Seizure*.

1. A mortgage which is given by an entryman on government lands while a single man, and pending a proceeding to contest and cancel a prior homestead entry, and after he has planted a crop on said land, and after the determination of the contest in his favor in the local land office, but before the issuance of the final order by the General Land Office, and before he has actually filed as an entryman under his preference right, is a valid lien both as against the entryman and the family homestead rights, even though

PUBLIC LANDS—continued.

such entryman may have married between the time of the execution of such mortgage and the final order of the General Land Office and his filing thereunder, final proof having subsequently been made. *Gunsch v. Urban Mercantile Co.* 390.

2. On approval of a contract for the sale of school land, the purchaser obtains a title subject to transfer by deed and by execution sale and subject to taxation and to adverse possession. *School District No. 109 v. Hefta*, 637.

PUBLIC OFFICERS. See *Officers*.

QUANTUM MERUIT.

Recovery by broker on, see *Brokers*, 1.

Pleading as to, see *Pleading*, 4.

The test of an action on the *quantum meruit* is that the plaintiff shall first allege the doing of the work, at the request of the defendant, and that for the work he reasonably deserves to have a specified sum. *Farmer v. Holmes*, 344.

RAILROADS.

As carriers, see *Carriers*.

Evidence examined and held to furnish prima facie proof that a prairie fire had been started by a railway engine. *McGilvra v. Minneapolis, St. P. & S. Ste. M. R. Co.* 275.

RATES.

Of carriers, see *Carriers*.

REAL ESTATE AGENTS. See *Brokers*.

REAL PROPERTY.

Executory land contract as real property, see *Levy and Seizure*.

Mortgage on, see *Mortgage*.

Sale of, generally, see *Vendor and Purchaser*.

RECOUPMENT. See *Pleading*, 8; *Set-Off and Counterclaim*, 2.

REDELIVERY BOND. See *Evidence* 12; *Judgment* 4; *Trial*, 2.

REINSTATEMENT.

Of cause by appellate court, *see* Appeal and Error, 17.

RELEVANCY.

Of evidence, *see* Evidence, 11-14.

REMITTITUR.

Recall of, *see* Appeal and Error, 17.

REPLEVIN.

Evidence in action for breach of redelivery bond, *see* Evidence, 12.

Conclusiveness against sureties on bond of judgment against principal, *see* Judgment, 4.

Sufficiency of evidence to take case to jury in action on redelivery bond, *see* Trial, 2.

RESCISSION.

Of contract generally, *see* Election.

Of contract of sale, *see* Sale, 1.

RES JUDICATA. *See* Judgment, 3, 4.

REVERSIBLE ERROR. *See* Appeal and Error, 9-15.

ROUTE.

Of proposed highway, *see* Highways, 2-4.

RULES OF DECISION. *See* Courts, 15.

SALE.

Burden of proof as to validity of contract and terms thereof, *see* Evidence, 6.

As to sale in fraud of creditors, *see* Fraudulent Conveyances.

1. Before an action for the purchase price can be brought upon an indivisible contract for the sale and delivery of a bill of goods, it is incumbent upon the plaintiff to show a full performance of such contract on his part and

SALE—continued.

- the delivery and passing of title of the entire order before a rescission of such order or contract by the purchaser. *Elliott Supply Co. v. Green*, 641.
2. Where the contract of purchase is silent to the person or mode by which goods are to be sent, a delivery by the vendor to a common carrier in the usual and ordinary course of business transfers the property to the vendee. Yet in the case of an indivisible contract the whole order must be so delivered. *Elliott Supply Co. v. Green*, 641.

SCHOOL LANDS.

In general, see **Public Lands**.

Levy on executory land contract for purchase of, see **Levy and Seizure**.

SECURITIES.

Requiring bank to remove objectionable securities, see **Banks**, 1-4.

SELF-EXECUTING PROVISIONS.

Of Constitution, see **Constitutional Law**, 5, 6.

SET-OFF AND COUNTERCLAIM.

Pleading as to set-off, see **Pleading**, 6, 8.

Stipulation by attorney as to, see **Stipulation**, 1.

1. Counterclaim examined, and held not to state a cause of action or defense. *Jensen v. Northwestern Underwriters Asso.* 223.
2. Damages which might have been recouped by the maker of a promissory note in an action against him by the original payee may be also recouped against a mere assignee thereof. *Emerson-Brantingham Co. v. Brennan*, 94.
3. Under the provisions of §§ 7396 and 7449 of the Compiled Laws of 1913, if C buys from B a non-negotiable note which is made by A to B, A can counterclaim against C an unliquidated claim arising out of another contract but prior to any notice of the assignment in question. *Emerson-Brantingham Co. v. Brennan*, 94.

SETTLEMENT.

Of insurance loss, powers of agent as to, see **Insurance**, 1.

Of insurance loss, waiver by, see **Insurance**, 6-8.

SHERIFF'S CERTIFICATE.

Parol evidence as to, see Evidence, 8.

Sufficiency of evidence that assignment of, was intended as certificate of redemption, see Evidence, 16.

SPECIAL INTERROGATORIES.

On trial, see Trial, 6.

SPECIAL VERDICT. See Trial, 10, 11.**STATE.**

Amendment of Constitution as to seat of government, see Courts, 2.

STATE BANKING BOARD. See Banks, 1-4.**STATE CENTRAL COMMITTEE.**

Of political party, see Courts, 7; Elections.

STENOGRAPHER.

Allowance as costs of fee paid court stenographer, see Costs and Fees, 3.

STIPULATION.

1. A stipulation by counsel that, "if the plaintiff should recover, the defendant is entitled to be credited with the amount of the counterclaims set up in the answer," is held, under the facts of the case, to be merely the expression of a legal opinion or conclusion, and to be not binding upon either the trial or the appellate court. *Jensen v. Northwestern Underwriters Asso.* 223.
2. Where the only resident attorney and attorney of record in a lawsuit signs and consents to the filing of a stipulation advancing the cause upon the calendar of the supreme court and setting it for hearing upon a day certain, such stipulation will not be set aside upon an affidavit by him merely to the effect that "he believes" he had no authority to sign the same, and that "he is informed" his nonresident associate counsel would be engaged and unable to prepare the brief, when the facts as to authority and engagements are clearly matters of positive knowledge to his client, and such nonresident counsel, and these persons themselves furnish no proof or affidavits whatever of the facts alleged, and when the court is satisfied that counsel had abundant time for preparation. *Youmans v. Hanna*, 479.

STOCK.

Purchase of controlling stock in bank, see Banks, 5.

Forfeiture of corporate stock, see Corporations.

STORAGE.

By warehousemen, see Warehousemen.

SURPRISE.

New trial on ground of, see New Trial, 2.

TAXES.

Self-executing provisions in Constitution as to exemptions, see Constitutional Law, 6.

1. The legislature did not exceed its constitutional powers by the enactment of subdivision 9 of § 2078 of the North Dakota Compiled Laws of 1913, which provided for the exemption from taxation of the personal and real property owned by charitable associations known as posts, lodges, chapters, councils, commanderies, consistories, and like organizations and associations not organized for profit, grand or subordinate, and used by them for places of meeting, and to conduct their business and ceremonies; provided, that such property is used exclusively for such charitable purposes. State ex rel. Linde v. Packard, 298.
2. A building belonging to a Masonic organization, and devoted exclusively to Masonic use, the greater portion of said building being used for the place of meeting and in which to conduct the business and ceremonies of various subordinate Masonic bodies, and a small portion thereof being occupied by the office of the grand secretary of the Masonic grand bodies of this state, is exempt from taxation under the provisions of subdivision 9 of § 2078, Compiled Laws, North Dakota, 1913. State ex rel. Linde v. Packard, 298.

TENDER.

Of amount due on notes secured by notes, see Mortgage.

TERM.

Of office of judge, see Evidence, 1; Judges, 5, 6.

Of office generally, see Office, 1.

TRIAL.

As to new trial, see New Trial.

As to witnesses, see Witnesses.

RECEPTION OF EVIDENCE.

1. A party must offer to prove the facts sought to be elicited from his witness before he can assign error upon an objection sustained to a question, the competency of which is not apparent on its face. *Farmer v. Holmes*, 344.

SUFFICIENCY OF EVIDENCE TO GO TO JURY.

2. In an action to recover for the alleged breach of a redelivery undertaking in claim and delivery, one of the issues tried was whether the property involved in such prior action had been redelivered to plaintiff pursuant to the judgment. Plaintiff's contention that such issue was erroneously submitted to the jury because of alleged insufficiency of the evidence, *held*, untenable. *Clark v. Ellingson*, 546.

QUESTIONS OF LAW AND FACT.

3. All inferences from the circumstances proved, including the alteration apparent upon the face of the instrument when examined under a microscope, are of fact and for the determination of the jury as issues of fact. *Behles v. Duffy*, 181.
4. Whether the real estate agent was in fact the procuring cause of the sale which was consummated is held in the case at bar to be a question for the jury, and not for the court, to pass upon. *Farmer v. Holmes*, 344.

DIRECTION OF VERDICT.

Prejudicial error as to, see Appeal and Error, 15.

See also Trover and Conversion, 1.

5. A motion for a directed verdict in favor of the defendant for a dismissal of the action is properly denied where there is some evidence from which the jury can make a finding of damages in favor of the plaintiff. *Swallow v. First State Bank*, 608.

SPECIAL INTERROGATORIES.

6. It is *held*, for reasons stated in the opinion, that certain assignments of error

TRIAL—continued.

predicated upon the form of interrogatories to the jury and the court's instructions to the jury are without merit. *Swallow v. First State Bank*, 608.

INSTRUCTIONS.

Prejudicial error in, see *Appeal and Error*, 11–15.

7. An instruction to the effect that "I instruct you further that the testimony of one credible witness is entitled to more weight than the testimony of many others, if as to those other witnesses the jury have reason to believe, and believe from the evidence and all the facts before them, that such witnesses are mistaken or have knowingly testified untruthfully, and are not corroborated by other credible witnesses or by circumstances proved in the case, merely states a self-evident fact, and is not erroneous in not being confined to material matters, as it can only be construed to relate to particular matters concerning which the witness has testified and concerning which the jury believes that other witnesses have testified untruthfully, and does not pretend to be an instruction on the credibility of witnesses generally. *McGilvra v. Minneapolis, St. P. & S. Ste. M. R. Co.* 275.
8. It was not an error to instruct the jury that "the words procuring cause as applied to this case mean, that if you find from a fair preponderance of the evidence that the contract was as plaintiff claims, then a procuring cause means the original discovery of the purchaser by the broker, and the starting of the negotiations by him, together with the final closing by or on behalf of his client with the purchaser." *Farmer v. Holmes*, 344.
9. Where the purchaser of silverware was a druggist, and not engaged in the regular business of selling such goods, it was not error to instruct the jury that "if you find from the evidence that the agent of the plaintiff did represent to the defendant that the prices of the goods specified in the order were the usual wholesale prices of such goods; that the defendant relied on that statement and would not have signed the order if said statement had not been made; that such statement was false and known to the plaintiff to be false when it was made, and that the prices of such goods stated in the order were not the usual wholesale prices of such goods, but were excessive and more than the usual wholesale prices, then the written contract would be voidable as to the defendant." *Elliott Supply Co. v. Green*, 641.

VERDICT.

Direction of, see *supra*, 5.

Special interrogatories, see *supra*, 6.

Review of verdict on appeal, see *Appeal and Error*, 7, 8.

TRIAL—continued.

10. The finding of a jury in a special verdict should contain only the ultimate conclusions of fact in controversy, and not the evidence to prove them. *Swallow v. First State Bank*, 608.
11. A special verdict need not find a fact which is established by undisputed evidence. *Swallow v. First State Bank*, 608.

TRIAL DE NOVO.

On appeal, see Appeal and Error, 2, 3.

TROVER AND CONVERSION.

1. Where plaintiff's tenant directed a farm laborer to take his grain to an elevator at Courtenay, to be there left so that it could be divided between plaintiff and his tenant, but instead of doing so the laborer took it to an elevator at Kensal and there sold it and failed to account for the proceeds, an action of conversion will not lie against the latter elevator without proof of a demand for the grain; and where a demand is alleged in the complaint to have been made on the 26th day of May, 1914, and is not proved, but is merely a conversation and inquiry as to the transaction on the 29th day of November, 1913, and there is no proof of the value of the grain on the said 26th day of May, 1914, but merely of its value on the 28th day of November, 1913, it is not error for the trial court to direct a verdict for the defendant. *Skjerseth v. Woodworth Elevator Co.* 295.
2. While, under § 3113, Comp. Laws 1913, the warehouseman may sell stored grain and upon a demand for the delivery of grain stored substitute like grain therefor, yet the ticket holder need not make a demand in the alternative for the same grain or that of an equal grade as a basis for conversion, where the ticket holder has demanded the return of his grain or payment of its value. *State ex rel. Ertelt v. Daniels*, 5.
3. As between the holder of the storage ticket and the warehouseman there exists a bailment, with the title of the particular grain in the holder of the ticket. Hence refusal to comply with the demand for delivery of stored grain sufficiently lays a basis for conversion in such respect as against the warehouseman and his sureties upon the breach of his official bond. *State ex rel. Ertelt v. Daniels*, 5.

TRUSTEE PROCESS. See Garnishment.

TRUSTS.

Garnishment of personal property covered by unrecorded trust agreement, *see* Garnishment, 5.

Reservation in trust agreement as evidence of fraud, *see* Fraudulent Conveyances, 4.

VALUE.

Opinion evidence as to, *see* Evidence, 10.

VENDOR AND PURCHASER.

Construction of crop-payment contract, *see* Crops.

Complaint in action for failure to convey land, *see* Pleading, 5.

VENUE.

Liability for costs on change of, *see* Costs and Fees, 4.

VERDICT.

In general, *see* Trial, 10, 11.

VOTERS AND ELECTIONS. *See* Elections.**WAIVER.**

Of error in trial court, *see* Appeal and Error, 6.

Of conditions of escrow agreement, *see* Escrow, 3.

Burden of proof as to, *see* Evidence, 6.

By insurer, *see* Insurance, 6-9.

WARDS. *See* Guardian and Ward.**WAREHOUSEMEN.**

Admissibility in evidence of certified copy of bond of, *see* Evidence, 6a.

Conversion by, *see* Trover and Conversion.

1. Action for the benefit of ticket holders to collect sureties upon a warehouseman's statutory bond for a default in redemption of grain tickets; *Held*: 35 N. D.—45.

WAREHOUSEMEN—continued.

That the complaint states a cause of action, and the demurrer thereto was properly overruled. *State ex rel. Ertelt v. Daniels*, 5.

2. A demand for the grain or its value throws upon the warehouseman the burden of offering substituted grain if he would not or cannot redeliver to the ticket holder the identical grain stored. *State ex rel. Ertelt v. Daniels*, 5.

WARRANTS.

Of municipality, see *Municipal Corporations*, 2, 3.

WARRANTY.

In insurance contract, see *Insurance*.

WITNESSES.

Instruction as to credibility of, see *Appeal and Error*, 13; *Trial*, 7.
Opinions and conclusions of, see *Evidence*, 10.

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